

**DOES THE ADA PREVENT EXCLUSION OF A PLAINTIFF
FROM THE LIABILITY PHASE OF A BIFURCATED TRIAL?**

by Mark Lienhoop
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It is well settled that a trial court has the authority to bifurcate the issues of liability and damages. *See Frito-Lay, Inc. v. Cloud*, 569 N.E.2d 983 (Ind. Ct. App. 1991).

Indiana law also provides that under certain circumstances a trial court has the authority to exclude a plaintiff from the jury's presence during the liability phase of a bifurcated trial. *See Gage v. Bozarth*, 505 N.E.2d 64 (Ind. Ct. App. 1987).

The Court in *Gage* held that to protect the constitutional guarantees of due process and an impartial jury, a plaintiff may be excluded from the jury's presence during the liability phase of a bifurcated trial if a two-pronged standard is satisfied. First, is the plaintiff's appearance potentially prejudicial and likely to prevent the jury from performing its duty? *Id.* at 67. Second, is the plaintiff able to understand the proceedings and assist counsel in any meaningful way? *Id.* at 67.

The decision in *Gage* predated the enactment of what is commonly known as the Americans with Disabilities Act. The question is whether the ADA prohibits the exclusion allowed in *Gage*. No case has been found in any jurisdiction which specifically answers this question.

The ADA is found at 42 U.S.C.A. § 12101. It is divided into four main subchapters. Subchapter II applies to public entities. Within subchapter II, Section 12132 prohibits discrimination only against a "qualified individual with a disability." That phrase is defined in section 12131(2) as meaning an individual with a disability who, with reasonable modifications, meets "*the essential eligibility requirements*" for the participation in court proceedings (emphasis added).

In other words, not every discrimination by the State based on a disability would violate the ADA. For instance, a State may refuse to issue a driver's license to a blind person without violating the ADA because no reasonable modifications would make the blind person otherwise qualified to drive. *Cf. Hatch v. Secretary of State of Me.*, 879 F.Supp. 147 (D. ME 1995).

Similarly, under the ADA's definition, a plaintiff excluded from the jury's presence under the two prong standard set forth in *Gage* would not be a "qualified individual with a disability." This is because despite any "reasonable modifications," such a plaintiff would not meet "the essential eligibility requirements."

The first prong of the *Gage* standard is whether the plaintiff's appearance is potentially prejudicial and likely to prevent the jury from performing its duty. In this context, exclusion from the jury's presence is not necessarily the same as exclusion from the courtroom. The "jury's presence" would refer to the sight, or if appropriate, the hearing of the jury. Some modification may be able to be made to allow the plaintiff to remain in the courtroom while blocking the jury's view of or, if appropriate, hearing of

the plaintiff. However, if it is the very appearance or conduct of the plaintiff that must be kept from the jury in order to preserve a fair trial, then there would be no reasonable modification that would allow the plaintiff to be seen or heard by the jury while at the same time not allowing it.

The second prong of the *Gage* standard is whether the plaintiff can understand the proceedings and assist counsel in any meaningful way. Whether or not any reasonable modification could be made to accommodate such a plaintiff must necessarily depend on why the plaintiff cannot understand and assist. However, *Gage* provides an example of when no meaningful modifications would be helpful.

In *Gage*, there was no indication that the plaintiff had any mental defect or was incapable of communicating with counsel. Nevertheless, the Court held the second prong was satisfied because the seven year old plaintiff did not know the difference between a lie and the truth and did not have any recollection of the accident in issue. *Id.*, at 69. It is questionable whether waiting for a child to mature enough to understand the difference between a lie and the truth before proceeding with the trial would be a reasonable modification. Regardless, no reasonable modification could legitimately provide a memory that does not exist.

The closest cases found on this issue also suggest that exclusion under the *Gage* standard, properly applied, would not violate the ADA. These are two cases involving blind jurors. *See Galloway v. Superior Court of the District of Columbia*, 816 F.Supp. 12 (D.C. 1993); *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713 (1993). Those

cases hold that a blanket exclusion from jury service based on blindness alone violates the ADA, but an exclusion in a particular case may still be appropriate if necessary for a fair trial. An example given was whether the assessment of physical evidence would be critical to the jury's determination.

These holdings are consistent with the holding in *Gage*. In *Gage*, the Court held that it would never be proper to exclude a plaintiff where the extent of injuries is relevant to a determination of damages. However, the Court in *Gage* held that a trial court does have the discretion, under certain special circumstances, to exclude a plaintiff from the jury's presence during the liability phase of a bifurcated trial if necessary to protect the constitutional guarantees of due process and an impartial jury.

Similar to the ADA, Art. 1, Sec. 23 of the Indiana Constitution guarantees equal privileges to all citizens. The Court in *Gage* held that the exclusion of injured plaintiffs from the courtroom when healthy plaintiffs are allowed is not discrimination in violation of Art. 1, Sec. 23. The protection of the public interest in a fair and impartial jury trial outweighed the right to be present during the liability phase of a trial, where the plaintiff could not understand the proceedings or assist counsel, and where the trial court finds the plaintiff's presence would have a potentially prejudicial effect on the jury. This holding is entirely consistent with the plain language of the ADA. Therefore, the ADA does not prevent exclusion of a plaintiff from the liability phase of a bifurcated trial when the two prong standard of *Gage* is met.

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