Post-obit ADA Claims
Thomas E. Simmons
Post-obit ADA Claims
by Thomas E. Simmons*

Seminie John Guenther oversaw construction projects for his employer, Griffin Construction, until one day in 2012, when his doctor diagnosed him with prostate cancer. He took three weeks off with his boss’ permission to undergo treatment, returning to work after it appeared he had been cured. A year later, the cancer returned and metastasized into his lungs. Initially, he deferred treatment and continued working, but his conditions worsened. At one point, Guenther had an episode where he was unable to swallow. He asked for another three weeks leave to pursue radiation treatment. Instead, Griffin Construction fired him and (despite promises to the contrary) cancelled his life insurance and health insurance.

Guenther filed a disability discrimination complaint against his employer with the U.S. Equal Employment Opportunity Commission (EEOC). Twenty months later, a right-to-sue letter was issued, but by then, Guenther had been dead a year. When the administrator of his estate filed suit under Title I of the Americans with Disabilities Act (ADA), the Arkansas district court dismissed the complaint, reasoning that the claim had abated with Guenther’s death.1

In reaching this conclusion, a dense analysis was required. As the district court explained, Guenther’s lawsuit “involve[d] complex questions touching on the nature of federalism, the power of the federal courts, and the content of federal common law.”2

Lawyers who have attended law school since 1938 could be excused for thinking that the district court was terribly amiss in referencing “federal common law” as a basis for its rationale. Ever since the Erie v. Tompkins decision authored by Justice Louis Brandeis, the rule has been that “[t]here is no federal general common law.”3 Brandeis reasoned that the uniformity of law which pervasive federal common law had sought to achieve had resulted in just the opposite. The divergence of state and federal law resulted in “mischievous” forum shopping.4 To deter this practice, he declared an end to “federal general common law.” The key word, here, however, is “general.” As the district court deciding Guenther’s estate’s claim explained: “[T]here is still federal common law, though it is no longer general. It survives in pockets of law involving important federal interests.”

Actually, federal common law survives in quite a few pockets. Federal common law lives on in cases affecting the obligations of the federal government, interstate commerce, admiralty, international relations, the preclusive effect of dismissals in diversity cases, ERISA, CERLA, and copyright.5 Procedural (as opposed to substantive) matters are also governed by federal, not state law, in federal courts. In recent years, however, federal courts’ ability to create rules of federal common law have been curtailed sharply.6

The ADA statutory text does not contain a “survival statute” which would clarify whether an ADA employment discrimination claim dies with the plaintiff. Nor is there any general federal survival statute. Some courts have concluded that whether an ADA claim survives the plaintiff’s death turns on state law.8 The statute of limitations applicable to ADA claims depends on state law as well.9 But, applying the Arkansas state survival statutes to Guenther’s claim would result in a dismissal of the claim, as the district court had done.

On appeal, in Guenther v. Griffin Construction Co., Inc., the Eighth Circuit Court of Appeals reversed the Arkansas district court.10 It emphasized that although the question of whether an ADA claim survives death is a question of federal law, the more difficult task “is giving content” to the issue.11 In giving content to the federal issue, courts sometimes incorporate state law and other times turn to federal common law. Whether a uniform federal common law rule or state law should apply depends on the nature of the issue and the effects on governmental interests.

A rubric for sorting out these policy concerns was articulated in the Supreme Court case of Kamen v. Kemper Financial.12 There, the Court explained that when federal courts are applying a federal statute, any common law rule necessary to effectuate a private suit is necessarily federal in nature. However, the content of the rule need not be simply a product of the federal court’s own devising. Filling the interstices of a federal remedial scheme (like the ADA) with uniform federal rules should be avoided unless there is a distinct need. In most cases, state law should be consulted. The question is whether specific objectives of a federal program would be frustrated under a state law application. The district court had carefully considered these concerns and concluded that no “distinct” need was present and, therefore, that the Arkansas survival statute abating the claim should be applied.

In Guenther, the Eighth Circuit turned to the ADA’s aims – as articulated by Congress – to ‘provide a clear and comprehensive national mandate’ with ‘clear, strong, consistent, [and] enforceable standards’ to address the ‘serious and pervasive social problem’ of disability-based discrimination on a case-by-case basis.13

To rid the nation of discrimination against individuals with disabilities, uniformity is essential, lest this mandate be frustrated. Although not a question of statutory construction (the statutes are silent on the question of ADA claim survival), the court still turned to the ADA statutes for guidance. The court emphasized the threat to ADA enforcement if claims abated at death. ADA claims involve disabled plaintiffs, making it more likely that an aggrieved party may die before the case is complete “given the health issue which brings him or her under the statute’s protections.”14 The court went on:

Post-obit ADA Claims
(Continued on page 12)
Post-obit ADA Claims
(Continued from page 11)

Congress passed the ADA to eradicate discrimination against disabled persons, some of whom may be targeted precisely because of their poor health. A state law allowing claims to abate when the aggrieved party dies impedes this broad remedial purpose.\(^1\)

The court was also sensitive to the lengthy path to trial that an ADA claimant with serious health issues may face on account of administrative exhaustion requirements. Guenther’s administrative process took almost two years before a complaint could be filed in federal district court. The Eighth Circuit Court of Appeals also observed that if ADA claims were allowed to abate under state law, employer-defendants might be tempted to prolong litigation. Therefore, it concluded, a distinct need for a uniform federal rule was needed.

The traditional federal common law maxim is that claims which are not penal in nature survive the death of the plaintiff; those which are penal in nature do not. Only Guenther’s estate’s claim for punitive damages could be construed as penal. In view of authority from other courts that a claim for punitive damages will be stricken from a deceased plaintiff’s claim under this maxim, the estate’s attorneys had conceded that they could not recover punitive damages. Interestingly, however, the Eighth Circuit concluded thus: “We intimate no view as to whether a claim for punitive damages would survive...”\(^2\)


\(^2\) Id. at 667.

\(^3\) Erie v. Tompkins, 304 U.S. 64, 78 (1938) (overruling Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842)).

\(^4\) Id. at 74.

\(^5\) Guenther, 161 F.Supp.3d at 671.


\(^7\) Marsh v. Rovenbloom, 499 F.3d 165, 181 (2nd Cir. 2007). “To justify creation of a rule of federal common law, [a party] must show specifically a ‘significant conflict between some federal policy or interest and the use of state law.’” Id. (citation omitted).

\(^8\) E.g., Hutchinson on Behalf of Baker v. Spink, 126 F.3d 895, 898 (7th Cir. 1997).

\(^9\) Gaona v. Town & Country Credit, 324 F.3d 1050, 1054 (8th Cir. 2003).


\(^11\) Id. at 982 (emphasis supplied by the court).


\(^13\) Guenther, 846 F.3d at 983, quoting 42 U.S.C. sec. 12101(a)(2), (b)(1)-(2) (emphasis supplied by the court).

\(^14\) Id. at 984.

\(^15\) Id.

\(^16\) Id. at 986.

*Thomas E. Simmons is an associate professor at the University of South Dakota School of Law.