ADA Legal Update
ADA Audio Conference Series
October 18, 2005

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A. ADA CASES DECIDED BY SUPREME COURT AND RECENT LOWER COURT CASES INTERPRETING THOSE CASES

1. *Spector v. Norwegian Cruise Line Ltd.*, ___ U.S. ___, 125 S. Ct. 2169 (2005)

a. Summary

Disabled passengers brought action against foreign-flagged cruise ship, alleging violations of Title III of the ADA. Specifically, plaintiffs alleged that physical barriers on the ships denied them access to: (1) emergency evacuation equipment and emergency evacuation-related programs; (2) facilities such as public restrooms, restaurants, swimming pools, and elevators; and (3) cabins with a balcony or a window. Plaintiffs also allege that the defendant charged them a premium for use of the four accessible cabins and the assistance of the ship's crew. The defendant moved to dismiss arguing that the ADA did not apply to foreign-flagged cruise ships. The 5th Circuit Court of Appeals found that Congress may enact legislation that governs foreign-flagged cruise ships operating within United States waters, but it must clearly indicate its intention to do so. The court found no indication, either in the statutory text or in the ADA's extensive legislative history, that Congress intended Title III to apply to foreign-flagged cruise ships. Accordingly, the case was dismissed.

The Supreme Court reversed and held that the ADA applies to foreign-flagged cruise ships operating in U.S. waters to the extent it does not interfere with the internal operations of the ship. Five Justices agreed that certain discriminatory policies, such as charging persons with disabilities higher fares or requiring them to travel with companions would not interfere with "internal operations." However, the Court also stated that the removal of barriers would be more likely to interfere with "internal operations," but, in any event, would not be "readily achievable" if it would bring a vessel into noncompliance with international safety standards.

2. *State of Tennessee v. Lane,* 124 S. Ct. 1978, (2004)

a. Summary

Three years after the Supreme Court ruled in *Garrett* that States are immune from employment discrimination suits for money damages in federal court under Title I of the ADA, the Supreme Court agreed to hear a case to decide whether Congress acted properly when it made states subject to suits in federal court under Title II of the ADA. The plaintiffs in the case, two Tennessee residents with paraplegia, were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators. One of the plaintiffs, Beverly Jones, sought access to the courtroom to perform her work as a court reporter. The other plaintiff, George

Lane, was unable to attend a criminal proceeding being held in an inaccessible second-floor courtroom; the state arrested him for failure to appear when he refused to crawl or be carried up the steps. Lane and Jones filed suit under Title II of the ADA to challenge the state's failure to hold proceedings in accessible courthouses. In response to the ADA suit, the State of Tennessee argued that it is immune from suits under Title II of the ADA.

Many lower courts have held that the Supreme Court's ruling that states cannot be sued for money damages in ADA employment discrimination cases should be extended to suits for money damages against the state under Title II as well. The plaintiffs argued that there is a stronger history of discrimination by states under Title II and therefore, states should not be immune from suits for money damages. Additionally, the plaintiffs argued that, at the very least, the Supreme Court's decision in *Garrett* that states are subject to claims for injunctive relief under Title I of the ADA should be extended to Title II.

In a 5-4 decision, the Supreme Court held that states are subject to lawsuits filed in federal court for money damages under the ADA in cases involving access to the courts. The question before the Supreme Court was whether Congress acted properly when it enacted the ADA and made states liable for discrimination against people with disabilities in the provision of government services. The Supreme Court has decided that the ADA does apply to the states when people with disabilities seek to enforce their rights to gain access to the courts. In its decision, the Supreme Court ruled that when the ADA was passed, Congress identified an extensive history of discrimination by states in the provision of its programs and services for people with disabilities. The Court went on to hold that the remedies set forth by Congress in the ADA were appropriate to address the objective of enforcing access to the courts for people with disabilities. While the Court limited its holding to cases involving access to courts, its expansive analysis documents the history of state-sponsored discrimination against people with disabilities in many different areas (such as voting, education, institutionalization, marriage and family rights, prisoners' rights, access to courts, zoning restrictions, and other areas) and contains broad statements about the careful tailoring of Title II's requirements generally. These aspects of the decision may prove helpful in defending the constitutionality of other applications of Title II in future cases.

b. Recent Interpretations

The following cases have been decided applying the Supreme Court's decision in *Lane*.

i. Access to Courts:

- ***Badillo-Santiago v. Naverira-Merly,* 2004 WL 1687881 (1st Cir. July 29, 2004)** The plaintiff in the case is hard of hearing and he requested an accommodation during a court proceeding, which the court granted, but he later deemed to be inadequate. Because the case involved access to the court system, the 1st Circuit denied defendant's claim of immunity based on a direct application of *Lane*.

ii. Prisons:

- ***Miller v. King*, 384 F.3d 1248 (11th Cir. 2004),** plaintiff, a prisoner with paraplegia, filed ADA and other claims against prison officials for failure to properly accommodate him in prison (problems included: inaccessible toilets and showers, failure to transfer him from his bed to his wheelchair, failure to provide catheters, inadequate medical care, etc.) The 11th Circuit refused to extend *Lane* to the context of prisons. The 11th Circuit also upheld state immunity in a similar unreported prison case called ***Goodman v. Ray***, 120 Fed. Appx. 785 (11th Cir. Sept. 16, 2004). The U.S. Supreme Court has agreed to hear this case, now known as ***Goodman v. Georgia,* 125 S.Ct. 2266 (2005),** with oral argument set for November 9, 2005. It will be interesting to see if the Court limits its decision to immunity in prison cases, as the Court limited its decision to the courts in *Lane*, or if it will provide guidance beyond the specific facts of this case.
- ***Phiffer v. Columbia River Correctional Inst.*, 384 F. 3d 791 (9th Cir. 2004)**, prisoner with osteoarthritis and osteoporosis sued under the ADA. The 9th Circuit held that after *Lane*, prisoners can sue for money damages under Title II.
- ***Haas v. Quest Recovery Serv., Inc.*, 338 F. Supp. 2d 797 (N.D. Ohio 2004),** plaintiff claimed prison officials violated the ADA because of a lack of elevators, accessible toilets and showers. The court found that the plaintiff's claims were based on a denial of equal protection, not due process, and therefore she could not rely on the Supreme Court's decision in *Lane.* The court did allow the plaintiff's claims under the Rehabilitation Act to proceed.
- ***Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), *vacated and held pending Supreme Court's decision in Goodman v. Georgia,* 412 F. 3d 500 (3d Cir. 2005),** plaintiff, who is blind, was seeking damages for the time his talking books, talking watch, useable lock and walking cane were taken away. The court held that sovereign immunity barred the inmate's suit and that Title II was not an appropriate, proportional response to the alleged violations.
- ***Bane v. Va. Dep't of Corr.*, 267 F. Supp. 2d 514 (W.D. Va. 2005),** prisoner alleged he was excluded from prison programs and activities because of his disability. The court held that this case did not implicate a fundamental constitutional right or affect individuals of a suspect class, and so, the state was immune.
- ***Hill v. Ehrlich*, 2005 WL 1220885 (D. Md. May 23, 2005),** plaintiff was a prison inmate who claimed that prison officials had refused him his medication for ADD/ADHD. The court found that *Lane* was limited to cases involving fundamental rights that were not at issue in this case.

iii. Education:

- ***McNulty v. Board of Education*, 2004 WL 1554401 (D. Md. July 8, 2004),** plaintiff claimed that the school board failed to accommodate her son's disabilities. The court held that even after *Lane*, the school board was immune because unlike access to the courts, education is not a fundamental right.
- ***Johnson v. Southern Connecticut State University,* 2004 WL 2377225 (D. Conn. Sept. 20, 2004),** plaintiff sued his school for the failure to accommodate his mental disability and not selecting him for a nursing program. The court found

that the right to an education is not considered "fundamental" and the university cannot be sued for money damages under Title II.

- ***Association for Disabled Americans v. Florida International University,* 405 F.3d 954 (11th Cir. 2005),** plaintiffs filed suit against University for failing to provide qualified sign language interpreters, failing to provide necessary auxiliary aids, such as effective note takers, as well as failing to provide physical access to students with disabilities. The 11th Circuit ruled that the Supreme Court's reasoning in *Lane* should be extended to public education.
- ***Press v. State Univ. N.Y.,* 2005 WL 2360050 (E.D.N.Y. Sept. 27, 2005),** a student with dyslexia and dysgraphia requested use of a calculator in class. Despite the evidence of a pattern of discrimination in education, the court declined to extend *Lane* to apply to education.
- ***Constantine v. Rectors & Visitors of George Mason University,* 411 F.3d 474 (4th Cir. 2005),** plaintiff had migraine headaches and the university refused to allow her extra time to complete an exam. The 4th Circuit agreed that *Lane* should be extended to higher education and rejected the state's immunity claim.
- ***Costello v. University of North Carolina at Greensboro,* 2005 WL 1528788 (M.D.N.C. June 29, 2005),** plaintiff was a college student with obsessive compulsive disorder who alleged that the university golf coach and others discriminated against him. Court held claim did not involve a fundamental right and upheld defendant's sovereign immunity claim. Plaintiff's Rehabilitation Act claim was allowed to proceed.

iv. Testing Accommodations:

- ***Roe v. Johnson,* 334 F. Supp. 2d 413 (S.D.N.Y. 2004),** plaintiff alleged that inquiring into mental health history of bar applicants violated the ADA. The court found no ADA legislative history establishing a pattern of unconstitutional discrimination in bar admissions. Therefore, state was immune from money damages under Title II.
- ***Simmang v. Texas Bd. of Law Examiners,* 346 F. Supp. 2d 874 (W.D. Tex. 2004),** plaintiff sued the Texas Board of Law examiners after being denied a testing accommodation. The court declined to extend *Lane's* abrogation of sovereign immunity into the realm of Law Board examinations. The court employed a strictly limited interpretation of *Lane,* holding that it stands only for the proposition that states can be sued for failing to provide access to the courts.

v. Disability Services:

- ***Buchanan v. Maine*, 377 F. Supp. 2d 276 (D. Me. 2005),** plaintiff was the representative of a mental health services client who was fatally shot by police. The court held that Title II of the ADA does not abrogate states' sovereign immunity as applied to public mental health services because provision of such services does not implicate a fundamental right.
- ***Bill M. v. Nebraska Dept. of Health and Human Services Finance and Support*, 408 F.3d 1096 (8th Cir. 2005),** plaintiffs, developmentally disabled adults, sued because they were denied "home and community-based Medicaid-funded services." The Eighth Circuit limited Lane to the right of access to the courts.

vi. Employment:

- ***Blumberg v. Nassau Health Care Corp.*, 378 F. Supp. 2d 122 (E.D.N.Y. July 8, 2005)**, plaintiff, a pediatric endocrinologist, was diagnosed with breast cancer, and was terminated when she returned to work. The court held that Title II of the ADA was broad enough to encompass plaintiff's claim because "her termination was willful and motivated by disability-discriminatory animus."
- ***Cisneros v. Colorado*, 2005 WL 1719755 (D. Colo. July 22, 2005),** plaintiff, a state employee with a back injury, brought a claim for disability employment discrimination under Title I and Title II of the ADA. The court dismissed plaintiff's case on the basis that his claims fell within the Supreme Court's decision in *Garrett,* which held that states were immune from Title I suits for damages in federal court.

vii. Public Events:

- ***Douris v. Office of the Pa. Attorney General*, 2005 WL 1950810 (3rd Cir. Aug. 16, 2005),** individual with arthritis and carpal tunnel syndrome wanted access to a public auction. The court held that *Lane* did not apply because the case was not about access to the courts.

3. *Bragdon v. Abbott,* 524 U.S. 624 (1998)

a. Summary

In ***Bradgon v. Abbott,* 524 U.S. 624 (1998)**, a person with HIV filed an ADA Title III case against her dentist when he refused to treat her in his office. The Supreme Court found that the plaintiff's HIV substantially limited her in the major life activity of reproduction and therefore, would be considered a disability under the ADA.

b. Recent Interpretations:

- ***Worster v. Carlson Wagon Lit Travel, Inc*., 353 F. Supp. 2d 257 (D. Conn. 2005),** terminated employee with HIV brought suit, claiming discrimination under the ADA and other laws. Plaintiff alleged that he was limited in the major life activities of reproduction and sexual activity. The court ruled that he could not credibly allege that his HIV infection substantially limited the major life activity of reproduction because he had previously testified in his deposition that he had no plans to have children. Similarly, the plaintiff had testified that his HIV status has not affected his sexual activity and the judge found to the extent that a jury could infer from his assertions that his HIV-positive status restricted his ability to engage in unprotected sex, no reasonable jury could find from the evidence that this restriction rose to the level of a substantial restriction. This decision reiterates that HIV is not a *per se* disability and the importance that plaintiffs provide clear testimony about how their disability substantially limits a major life activity in their lives.
- ***Fiscus v. Wal-Mart Stores, Inc*., 385 F.3d 378 (3d Cir. 2004),** a former Wal-Mart employee had a kidney condition that requires the periodic cleansing of the blood through dialysis. When Wal-Mart refused to provide her with the accommodation to perform dialysis during her shift, she sued under the ADA. The 3rd Circuit ruled that the cleansing of the blood is a major life activity under the ADA. Relying on *Bragdon,* the Court noted that involuntary activities such as

breathing, thinking and reproducing are considered major life activities, and further noted that an activity is a major life activity when it is "central to the life process." **(*See also, Talbot v. Acme Paper & Supply Co.*, 2005 WL 2090699 (D. Md. Aug. 30, 2005)** employee with end stage renal failure was substantially limited in the major life activity of cleansing his own blood and caring for himself - the court cited *Bragdon* in clarifying that major life activities "do not necessarily have to have 'a public, economic, or daily character' to qualify" under the ADA.**)**

4. *Sutton v. United Airlines,* 527 U.S. 471 (1999)

a. Summary

In a trio of cases, the Supreme Court ruled that in determining whether a person with a correctable condition is substantially limited in a major life activity, the effects of the person's mitigating measure (e.g. eyeglasses, medication) must be considered.

b. Recent Interpretations:

- ***Capobianco v. City of New York*, 422 F.3d 47 (2nd Cir. 2005)** an employee with congenital stationary night blindness argued he was substantially limited in the major life activity of seeing. Defendant claimed that because he "mitigated" his condition by relying on others to drive him at night, he was not covered by the ADA. The 2nd Circuit rejected this argument and held that the mitigation under *Sutton* is limited to an "amelioration of the impairment itself, not simple avoidance of activities affected by the impairment."
- ***Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. June 7, 2005),** an employee with a breathing problem from a pulmonary embolism in her lung requested the use of oxygen. The court held that the employee did not have an actual disability under the ADA because using oxygen mitigated all the limitations her condition imposed on her performance of major life activities. However, the court also held that the employee could argue that she was regarded as having a disability.
- ***Talbot v. Acme Paper & Supply Co.*, 2005 WL 2090699 (D. Md. August 30, 2005),** an employee with end stage renal failure claimed that he was substantially limited in the major life activity of cleansing his own blood. The court held that he was a qualified individual under the ADA, as his kidney's inability to clean his blood substantially limited his major life activity of caring for himself. In analyzing the effects of mitigating measures under *Sutton*, the court noted that the "mitigative effect rendered by a particular treatment must be weighed against the negative side effects of that treatment." In this case, the mitigation from dialysis was outweighed by the burdens of using dialysis, and that these burdens constituted a substantial limitation on his ability to care for himself. (*See also, **Fiscus v. Wal-Mart,** **385 F.3d 378 (3d Cir. 2004)** question for lower court to determine whether dialysis mitigated the plaintiff's disability – the court indicated the effects of the mitigating measure (time consuming and cumbersome) might themselves result in the plaintiff being substantially limited in walking or other aspects of daily living.)
- ***D'Angelo v. Conagra Foods*, 2005 WL 2072131 (11th Cir. Aug. 30, 2005),** an employee with vertigo claimed she was substantially limited in the major life activity of working. The court held that the actual impairment claim failed

because the employee was only limited in her ability to work as a product transporter, and did not provide evidence of limitations for other positions.

- ***Daoud v. Avamere Staffing, LLC,* 336 F. Supp. 2d 1129 (D. Ore. 2004),** care facility aide with severe arthritis in her legs was fired after requesting an accommodation involving restricted physical movement and shorter hours. The defendant moved to dismiss based on the plaintiff's use of corrective measures such as a cane and cortisone injections. Court rejected defendant's argument and distinguished this case from *Sutton* because plaintiff was still substantially limited despite the mitigating measures she used.) (***See also, Little v. Texas Department of Criminal Justice,* 2004 WL 2313899 (Tex. Oct. 15, 2004)**, job applicant was significantly restricted as to manner in which she could walk, even with prosthesis. Plaintiff was not substantially limited in the major life activity of walking once her prosthesis was taken into consideration since she walked considerably slower and had a limp when she used the prosthesis.)

c. Cases Involving Diabetes

The number of people with diabetes is growing rapidly in the United States. Not surprisingly, during the last five years, disability discrimination complaints filed with the EEOC by workers with diabetes has increased by 13%. The EEOC has recently developed a fact sheet on diabetes that can be found at: www.eeoc.gov/facts/diabetes. Since *Sutton, a* large number of people with diabetes have had their ADA cases dismissed because of their use of the mitigating measure of insulin. However, some courts have found plaintiffs with diabetes are covered by the ADA:

- ***North Carolina Department of Health & Human Services v. Maxwell,* 576 S.E.2d 688 (N.C. App. 2003)** Court held that diabetes substantially limited an employee's ability to read.
- ***Nawrot v. CPC International*, 277 F.3d 896 (7th Cir. 2002)** Court held that an employee with diabetes was substantially limited in his ability to think and care for himself because he needed to inject himself with insulin three times a day and test his blood sugar level 10 times a day.
- ***Erjavac v. Holy Family Health Plus,* 13 F. Supp. 2d 737 (N.D. Ill. 1998)** Court held that an employee with diabetes may be disabled because she needed to frequently urinate because of short-term high blood glucose levels.
- ***Needle v. Alling & Cory, Inc*. 88 F. Supp. 2d 100 (W.D.N.Y. 2000)** Court held that an employee whose diabetes caused amputation of the toes of his right foot and his left heel was substantially limited in his ability to walk.
- ***Branham v. Snow,* 392 F. 3d 896 (7th Cir. 2004)** Court held there was sufficient evidence to find that employee was substantially limited in the major life activity of eating because of the restrictions and delicate balancing required to manage his diabetes.

5. *Olmstead v. L.C.*, 527 U.S. 581 (1999)

a. Summary

In ***Olmstead v. L.C.*, 527 U.S. 581 (1999)**, two women with mental retardation and mental illness were patients at a state-operated hospital in Georgia. Although state treatment professionals for both women had deemed them appropriate for community-based placements, both remained institutionalized. They filed suit under Title II of the ADA alleging that the state had violated the ADA's integration mandate. The Supreme Court found that the unwarranted institutionalization of people with disabilities is a form of discrimination that is actionable under the ADA. The Court ruled that the ADA requires States to serve people with disabilities in community settings, rather than in segregated institutions, when three factors are present:

- Treatment professionals determine community placement is appropriate;
- The person does not oppose community placement; and
- The placement can be reasonably accommodated taking into account the resources available to the State and the needs of others who are receiving State-supported services.

The Court ruled that a State can meet its obligations under Olmstead if it has a **comprehensive, effectively working plan** for evaluating and placing people with disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace and that is not controlled by the State's endeavors to keep its institutions fully populated.

b. Recent Interpretations:

i. Fundamental Alteration

The Supreme Court held that states must make reasonable modifications in the services it provides unless those modifications would result in a fundamental alteration. Many cases have turned on whether the plaintiffs' requested relief would be a fundamental alteration.

- ***Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151 (3rd Cir. 2005),** is a class action on behalf of residents of a state psychiatric hospital. Plaintiffs challenged the State's compliance with the court mandate to "develop a plan for future de-institutionalization of qualified disabled persons that commits it to action in a manner for which it can be held accountable by the courts." Plaintiffs argued that the State failed to provide "concrete, measurable benchmarks and a reasonable timeline for them to ascertain when, if ever, they will be discharged to appropriate community services." In contrast, the State argued that all it had to do was "demonstrate 'a commitment to take all reasonable steps to continue [its past] progress'" in order to satisfy the fundamental alteration defense. The court interpreted *Olmstead* "to mean that a comprehensive working plan is a necessary component of a successful 'fundamental alteration' defense." In this case, the State's efforts were insufficient to demonstrate "a reasonably specific and measurable commitment to de-institutionalization for which DPW may be held accountable." The court then provided specifics, stating that at a bare minimum, a comprehensive, effectively working plan should: "specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community."

- ***Pennsylvania Protection & Advocacy, Inc. v. Pennsylvania Dep't of Public Welfare*, 402 F. 3d 374 (3d Cir. 2005),** is a class action brought on behalf of residents in a nursing facility serving people with psychiatric and developmental disabilities. The Third Circuit stated that budgetary constraints alone do not satisfy the fundamental alteration defense. The court also found that defendants did not meet the fundamental alteration test because they failed to demonstrate a "commitment to action" to come into compliance with the ADA. The court held that demonstrating such a commitment is a prerequisite to establishing a fundamental alteration defense, and only when this is demonstrated do budgetary issues even become a factor.
- ***Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005),** plaintiffs argued that paying lower wages and benefits to community-based service providers than employees in state institutions was resulting in some individuals with developmental disabilities being unnecessarily institutionalized. The court held that California already had an acceptable de-institutionalization plan in place, and that disrupting it would be a "fundamental alteration of the State's current policies and practices in contravention of the Supreme Court's instructions in *Olmstead*." The court concluded, based on the record, that "California's commitment to the de-institutionalization of those developmental center residents for whom community integration is desirable, achievable and unopposed, is genuine, comprehensive and reasonable," and that disrupting this plan would impermissibly restrict the leeway given to states in their operation of developmentally disabled services.
- ***Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003),** is a case in which three women with physical disabilities challenged Oklahoma's decision to reduce the number of prescription drugs available under a Medicaid home and community-based waiver program. The plaintiffs challenged the five-prescription cap as a violation of the ADA's integration mandate, arguing that they would face the potential of institutionalization in nursing facilities (where residents are entitled to an unlimited number of prescriptions) if the cap were imposed. The Tenth Circuit Court of Appeals rejected the district court's conclusion that the state established its fundamental alteration defense because the decision to cap the prescription benefit was "reasonable" due to the state's "fiscal crisis." The court noted that the fact that "their actions were merely reasonable does not constitute a defense." It also stated that "the fact that Oklahoma has a fiscal problem, by itself, does not lead to an automatic conclusion that preservation of unlimited medically-necessary prescription benefits for participants in the [waiver] will result in a fundamental alteration." Importantly, the court recognized that the mere expenditure of funds does not create a fundamental alteration, writing: "If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed."
- ***Radaszewski v. Garner*, 383 F.3d 599 (7th Cir. 2004)** A young man with severe disabilities sought to receive nursing services in his home rather than in an institution. He had been receiving these services as a minor, but once he turned 21, he was no longer eligible for that program. However, at 21 he became eligible for the Home Services Program (HSP). Unfortunately, HSP did not provide the

number of in-home nursing services that the plaintiff required and the State took the position that it could only serve him in a nursing home. The State claimed that to serve him in his home was a fundamental alteration of its programs not required under the law. The 7th Circuit rejected the State's position and found that there was no fundamental alteration since the State already provided this service, just not at the level requested. The court found that the plaintiff's case was even stronger based on evidence that it would be cheaper for the State to serve the plaintiff in his home rather than in a nursing home.

- ***Arc of Washington v. Braddock,* 403 F.3d 641 (9th Cir. 2005)** Court held that the State of Washington was not required to provide more community services beyond the amount set forth in its Medicaid Home and Community-Based Services waiver program. The court went on to find that the specifics of Medicaid trump the more general community integration provisions of the ADA. (A petition for rehearing is currently pending in this case.)

ii. Risk of Institutionalization

Although the *Olmstead* case involved plaintiffs in institutions, courts have held that *Olmstead* includes people who are at risk of institutionalization.

- ***Bruggeman ex rel. Bruggeman v. Blagojevich,* 324 F.3d 906 (7th Cir. 2003),** court acknowledges that adults with developmental disabilities who are living with their parents, but are waiting for community services, are covered by the *Olmstead* decision.
- ***Fisher v. Oklahoma Health Care Auth.,* 335 F.3d 1175 (10th Cir. 2003),** court held that the integration mandate's protections are not limited to people who currently are institutionalized and that persons "who, by reason of a change in state policy, stand imperiled with segregation," may challenge that policy under the integration mandate.

6. Chevron v. Echazabal, 536 U.S. 73 (2002)

a. Summary

In ***Echazabal,*** plaintiff was offered a job contingent on passing a medical examination. The examination revealed elevated liver enzymes and he was eventually diagnosed as having asymptomatic chronic active hepatitis C. Accordingly, his employer rescinded the employment offer on the basis that plaintiff would pose a direct threat to his own health and safety. Issue was whether the defense of direct threat was limited to "threat to others" as set forth in the ADA or if it also included "threat to self" as defined in the EEOC's regulations. The Supreme Court held that direct threat included "threat to self" and thus, the employer's actions were deemed valid under the ADA. The Court emphasized that under the ADA's direct threat analysis, employers will have to rely upon objective medical knowledge and conduct an individualized assessment of the employee's present ability to safely perform the essential functions of the job instead of relying on stereotypes or paternalistic perspectives.

b. Recent Interpretations:

- ***Taylor v. Rice,* 2005 WL 913221 (D.D.C. Apr. 20, 2005),** plaintiff applied to be an officer with the Foreign Service, but his application was rejected because he is HIV positive. The State Department has a policy that prohibits the Foreign Service from hiring people with HIV in these positions, claiming that they may require medical treatment that is not available in some of the less-developed countries where they might be stationed. Relying on the Supreme Court's decision in *Echazabal*, the court held plaintiff would potentially be a direct threat to himself if he were hired as an officer in the Foreign Service and deployed to a place that could not meet his medical needs. The court also found that there were no reasonable accommodations available to sufficiently reduce the threat to himself. (Plaintiff's appeal to the D.C. Circuit Court of Appeals is pending.)
- ***EEOC v. E.I. du Pont de Nemours & Co.*, 2005 WL 1400430 (E.D. La. June 6, 2005),** an employee with back problems who had difficulty standing and walking was discharged, and the employer argued her difficulty walking posed a direct threat to herself or others because of her inability to evacuate in an emergency. The court held that there was no direct threat to herself or others because the employee had no emergency duties, the chance of an emergency at the plant was small, and the employee could both perform her job and evacuate despite the back problems.
- ***Hammel v. Eua Galle Cheese Factory*, 2003 U.S. Dist. LEXIS 7515 (W.D. Wis. 2003),** plaintiff was employed in a cheese factory. He was legally blind in one eye and had a restricted field of vision in the other eye. After his employment began, plaintiff's supervisors said that because of his disability they were concerned for the plaintiff's safety and the safety of other factory workers, and he was terminated. The court denied the employer's motion to dismiss based on direct threat finding that the employer failed to show that the employee posed a *significant* risk to himself or others. The court also reiterated that direct threat must be based on objective evidence, not unfounded fear or generalizations and stereotypes about a particular disability.

c. Burden of Proof

Although direct threat is a defense employers may raise, a few courts have ruled that employees have the duty to prove that they are not a threat in the workplace. However, a recent court found that employers have the burden of proof on the issue of direct threat. ***See, Branham v. Snow,* 392 F. 3d 896 (7th Cir. 2004)** (Where the essential job function issue relates to safety, the issue is one of direct threat, and therefore the employer has the burden of proof.)

B. EMERGING LEGAL ISSUES UNDER THE ADA

1. Medical Examinations and Inquiries

a. Who Can Bring Suit?

Section 12112(d) of the ADA prohibits employers from requiring applicants or employees from conducting medical examinations and asking disability-related inquiries at certain periods of the employment process. Courts have differed over the years about whether this provision of the ADA protects only people with disabilities, or if it would

apply to all employees. In other words, can people who cannot prove that they have an ADA disability, still be protected by the ADA's prohibition against improper medical examinations and disability-related inquiries?

The majority of courts have held that any applicant or employee who is subjected to an improper medical examination or disability-related inquiry has standing to challenge illegal medical examinations. In ***Roe v. Cheyenne Mountain Conference Resort,* 124 F.3d 1221 (10th Cir. 1997),** an employee filed an ADA suit against her employer for requiring employees to report their use of prescription drugs. The court held that the employer violated the ADA, and also ruled that the employee did not have to prove that she was an individual with a disability bring her ADA case. ***See also, Cossette v. Minnesota Power & Light,* 188 F.3d 964, 970 (8th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 (10th Cir. 1998), *cert. denied,* 526 U.S. 1065 (1999); *Fredenburg v. Contra Costa Co. Dept. of Health Services,* 172 F.3d 1176, 1182 (9th Cir. 1999), *Jackson v. Lake County,* 2003 WL 22127743 (N.D. Ill. Sept. 15, 2003).**

The reasoning supporting this line of cases is threefold. First, since Congress used the specific term "qualified individual with a disability" throughout much of the ADA, using the general terms "job applicant" and "employee" in §12112(d) evidences an intent to broaden the class of individuals covered in the specific section addressing disability-related inquiries and examinations. Second, since the purpose of the ADA was to put an end to discrimination against people with disabilities, courts have held that the best way to effectuate this purpose is to allow all job applicants to bring a cause of action against offending employers, rather than to limit that right to a narrower subset of applicants who are in fact disabled. Third, courts have held that it would be circular to require an employee to demonstrate that he has a disability in order to prevent his employer from inquiring as to whether or not he has a disability.

b. Are Personality Tests Considered Medical Examinations?

Although the ADA expressly prohibits medical examinations at the pre-employment stage, many employers administer "personality" tests ostensibly to obtain information about job applicants, such as honesty and temperament, as a way to determine whether the person would be a good hire. These tests have become widespread and studies have found that approximately 44% of private employers administer some type of personality test as part of the application or promotion process. Mental health advocates oppose these tests because they can be used to identify psychiatric disabilities resulting in the screening out of people with certain diagnoses. Accordingly, some employers are using personality tests to obtain illegal disability-related information in a more indirect way.

In ***Karraker v. Rent-A-Center,* 411 F.3d 831 (7th Cir. 2005),** a group of current and former employees filed a class action alleging that the employer's policy requiring employees seeking management positions to take the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA. The plaintiffs alleged that the MMPI can identify conditions such as depression, paranoia, schizoid tendencies and mania. The trial court found that the employer in this case did not violate the ADA because it was using the test for "vocational" purposes to identify personality traits in order to predict future job

performance and compatibility. The plaintiffs appealed and the Seventh Circuit reversed and held that the MMPI is a test designed to diagnose mental impairments, and thus, it is an improper medical examination and violated the ADA. The court found that "Americans with disabilities often face barriers to joining and succeeding in the workforce. These barriers are not limited to inaccessible physical structures. They also include attitudinal barriers resulting from unfounded stereotypes and prejudice. People with psychiatric disabilities have suffered as a result of such attitudinal barriers, with an employment rate dramatically lower than people without disabilities and far lower than people with other types of disabilities." (*But see* ***Bassett v. Rent-A-Center,*** **2003 WL 22683350 (3rd Cir. Nov. 14 2003)**, employee was required to take a personality test after being hired, and the test results indicated depression and dependency. After his termination, he alleged discrimination under the ADA. The court held there was no causal connection between the test and his termination and dismissed the case.)

c. Reasonable Accommodations in Examinations and Testing

When requiring job applicants or current employees to undergo examinations or testing, employers are required to provide reasonable accommodations for the testing process.

In ***Van Buskirk v. City of Indianapolis,*** **2004 WL 2137658 (S.D. Ind. 2004),** a dispatcher with childhood polio was terminated after failing a typing test. This test requirement had been waived when the plaintiff was first hired, and there was no evidence of employee misconduct or poor performance. The employer argued that the plaintiff could not perform the essential functions of the job because he failed the test, and that there was no possible accommodation. In denying summary judgment for the employer, the court held that there was little evidence that typing was an essential function of the job, as this requirement had previously been waived, and the plaintiff had successfully performed the job for seven years.

d. Physical Ability Testing

In its ADA Enforcement Guidance, the EEOC states that a physical agility test in which an applicant demonstrates the ability to perform actual or simulated job tasks is not a medical examination under the ADA. Similarly, a physical fitness test is not a medical examination unless the employer measures an applicant's physiological or biological responses to performance, then the test is a medical examination.

In ***Fuzy v. S&B Eng'rs & Constructors, Ltd.*****, 332 F.3d 301 (5th Cir. 2003),** an applicant for a pipefitting position failed to meet a 100 pound weight lift test, and was not hired. The court dismissed the plaintiff's suit, holding that the weight lifting requirement was job related.

In ***Jeffrey v. Ashcroft*****, 285 F. Supp. 2d 583 (M.D. Pa. 2003),** a chaplain with chronic pulmonary disease was terminated by the Bureau of Prisons after failing a physical abilities test. The court denied summary judgment for the employer, holding that there was not sufficient evidence to show that passing the physical test was related to an essential function of the job. Furthermore, chaplains hired before 1997 were not required to take the physical test, and the test requirement had been waived for other chaplains.

e. Inquiries about Credit Ratings

In the past, attorneys for plaintiffs have brought disparate impact race discrimination cases against employers who use credit rating information as part of the job application process. It is anticipated that similar cases will be brought under the ADA because of the disparate impact that credit rating information would have on people with disabilities.

2. Reasonable Accommodation Issues

a. Interactive Process

Once a reasonable accommodation has been requested, the employer should initiate an interactive process with the individual.

In ***Zivkovic v. Southern California Edison Co,* 302 F.3d 1080 (9th Cir. 2002),** the court stated that that the "interactive process requires: 1) direct communication between the employer and employee to explore in good faith the possible accommodations; 2) consideration of the employee's request; and 3) offering an accommodation that is reasonable and effective."

In ***Albert v. Smith Food & Drug Ctrs., Inc*., 356 F.3d 1242 (10th Cir. 2004),** the court held that once an employee triggered the interactive process by delivering to the employer a note from her doctor that she should avoid exposure to certain substances due to asthma, the employer had a duty under the ADA to work with the employee to identify any type of position that would reasonably accommodate her limitations.

In ***EEOC v. Sears, Roebuck and Co.,* 417 F.3d 789 (7th Cir. 2005),** the court stated that "after an employee's initial disclosure of a disability, the ADA obligates the employer to engage with the employee in an interactive process to determine the appropriate accommodation under the circumstances."

b. Reasonable Accommodation When Regarded as Having a Disability

The courts are split over whether reasonable accommodations must be provided to people who are "regarded as" having a disability. Courts upholding accommodations in "regarded as" cases rely upon the statutory language for reasonable accommodation, which does not differentiate between people with an actual disability and people with a perceived disability. Courts opposing extending reasonable accommodations in "regarded as" cases contend it would be bizarre to give an impaired but not disabled person a windfall because of the employer's erroneous perception of disability. Because of this split in opinion, the U.S. Supreme Court may ultimately resolve this issue.

i. Cases supporting accommodations in "regarded as" cases:

- ***Williams v. Philadelphia Housing Authority Police Department,* 380 F.3d 751 (3rd Cir. 2004);**
- ***Katz v. City Metal Co.,* 87 F.3d 26 (1st Cir. 1996);**
- ***Kelly v. Metallics West, Inc.* 410 F.3d 670 (10th Cir. 2005)**
- ***D'Angelo v. Conagra Foods*, 2005 WL 2072131 (11th Cir. Aug. 30, 2005)**

ii. Cases finding no accommodations required in "regarded as" cases:

- ***Kaplan v. City of North Law Vegas,* 323 F.3d 1226 (9th Cir. 2003);**
- ***Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999);**
- ***Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999);**
- ***Newberry v. East Texas State University,* 161 F.3d 276 (5th Cir. 1998)**

iii. Case declining to decide whether accommodations are required in "regarded as" cases:

- ***Cigan v. Chippewa Falls School Dist*., 388 F.3d 331 (7th Cir. 2004).**

c. Working at Home as a Reasonable Accommodation

The EEOC has issued a fact sheet addressing working at home as a reasonable accommodation under the ADA. The EEOC does not interpret the ADA to require an employer to create a teleworking policy. However, the EEOC did find that the people with disabilities should be able to participate in such a program if it exists and an employer may have to make modifications to such a policy to accommodate a person with a disability. Also, if an employer does not have a teleworking policy, the EEOC's position is that employers have to consider such an accommodation for a person with a disability. While some courts have found working at home is a reasonable accommodation, most courts have strictly interpreted these types of reasonable accommodation requests:

- **6th Circuit – *Smith v. Ameritech Publishing, Inc.*, 129 F. 3d 857 (6th Cir. 1997)** (it would take an "exceptional case" for working at home to be appropriate.)
- **7th Circuit – *Vande Zande v. State of Wisconsin*, 44 F.3d 538 (7th Cir. 1995)** (it would take an extraordinary case for an employee to succeed in an ADA case on the basis that the employer did not permit working from home.) ***See also, Rauen v. U.S. Tobacco Mftr. L.P.*, 319 F.3d 891 (7th Cir. 2003),** (employee's request to work entirely at home was not reasonable because her job required teamwork, interaction, and coordination and because she could perform the essential functions of her job at the work site, without accommodation.)
- **8th Circuit – *Heaser v. Toro Co.*, 247 F.3d 826 (8th Cir. 2001)** (working from home may in some circumstances be a reasonable accommodation), ***but see, Morrissey v. General Mills, Inc.*, 2002 WL 1339850 (8th Cir. 2002)** (telecommuting would be undue hardship on employer)
- **9th Circuit - *Humphrey v Memorial Hosp. Assn*., 239 F. 3d 1128 (9th Cir. 2001)** (working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause an undue hardship)
- **10th Circuit - *Mason v Avaya Communications,* 357 F.3d 1114 (10th Cir. 2004)** (physical presence was an essential duty of the job that required teamwork and supervision)

d. Reasonable Accommodations to Temporary Workers

With the rise in hiring temporary employees, employers may ask whether or not the ADA's reasonable accommodation provisions apply to these individuals. In response to this question, the EEOC has issued Enforcement Guidance on the Application of the

ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms. The EEOC guidance states that employers must follow the ADA even when it contracts with temporary workers. Although there have been no court decisions holding that the ADA applies to temporary workers, the EEOC recently settled a case in Illinois against an employer for failing to accommodate a temporary worker who had incontinence problems. The employer allowed the worker to go home to address the problem, but then called the temporary agency and informed the agency that it would not permit the worker to return. Because the employer terminated the worker without considering possible reasonable accommodations, the EEOC asserted that the employer violated the ADA. The case settled with the worker receiving $150,000.

3. Requirement to be "Whole" or "100% Healed"

Many employers have policies in which employees seeking to return to work or seeking reassignment can only do so if they have no restrictions on their work duties. Generally, these types of policies have been disfavored by the courts:

In ***EEOC v. Yellow Freight System, Inc.*, 2002 WL 31011859 (S.D. NY 2002),** court held that employer violated the ADA by applying a "100 percent healed" policy to a trucking company worker with a back condition. The judge awarded approximately $157,000 in back pay and $50,000 in punitive damages. The judge found that a policy requiring workers to be completely healed before returning to work clashes with the ADA's reasonable accommodation requirements.

In ***Allen v. Pacific Bell,* 212 F.Supp.2d 1180 (C.D. Cal. 2002),** court held that "100% healed" policies are *per se* violations of the ADA.

4. Disability Harassment

Courts are consistently recognizing that claims for disability-based harassment can be made under the ADA, similar to how sexual harassment claims are recognized under Title VII. To establish a hostile work environment claim under ADA, plaintiff must prove:

- **She is a qualified individual with a disability,**
- **She was subjected to unwelcome harassment,**
- **The harassment was based on her disability,**
- **The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment, and**
- **Employer knew or should have known about the harassment, but failed to take proper action to end it.**

Most cases are won or lost on the fourth factor, *i.e.*, whether the harassment was sufficiently severe or pervasive.

In ***Flowers v. Southern Regional Services,* 247 F.3d 229 (5th Cir. 2001),** employee alleged that she was harassed because she had HIV and the court held that the ADA's prohibition of discrimination in the terms conditions and privileges of employment encompasses a prohibition on disability harassment.

In ***Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001)**, employee with back impairment at automobile manufacturing plant held to have a valid cause of action under ADA against his employer for a hostile work environment after being subjected to numerous instances of harassment by co-workers and his supervisor.

In ***Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003)**, employee was subjected to harassment because of his disability of epilepsy. Employee's supervisor had revealed to co-workers that the employee had a metal plate in his head, which resulted in co-workers regularly calling him "Platehead." The Eighth Circuit first found that employees with disabilities can bring claims for hostile work environment under the ADA. However, in this case, the court ruled that the alleged harassing conduct was not sufficiently severe or pervasive to be actionable under the ADA.

In ***Lanman v. Johnson County*, 393 F.3d 1151 (10th Cir. 2004),** a deputy sheriff alleged she was harassed in the workplace when co-workers said she was "nuts" and "crazy." The Tenth Circuit first recognized that hostile work environment claims are actionable under the ADA. When examining the particular facts of the case, however, the court found that the plaintiff did not establish a claim for disability-based harassment because she did not prove that her employer believed the perceived impairment substantially limited her in at least one major life activity.

In ***Coulson v. Goodyear Tire & Rubber Co.*, 2002 WL 408872 (6th Cir. Mar. 14, 2002),** a colleagues' alleged name-calling and harassment of employee who suffered major depression and other mental problems, including calling employee "looney tune," "wacko" and "crazy," did not amount to hostile work environment actionable under ADA.

In ***Hamilton v. Independence Blue Cross*, 2005 WL 453087 (E.D. Pa. Feb. 25, 2005),** employee with psychiatric disabilities sued her employer under the ADA, including a claim of disability harassment. The court recognized that a hostile work environment claim exists under the ADA. However, the court found that the harassment the plaintiff faced was not severe or pervasive enough to create an abusive working environment.

In ***Rohan v. Network Presentation LLC*, 192 F. Supp 2d 434 (D. Md. 2002),** employee with mental illness sufficiently asserted hostile work environment claim under ADA by stating that she was forced by manager to divulge to approximately 30 co-workers intimate personal details relating to her disabilities in order not to "jeopardize" her continued employment.

5. Constructive Discharge

a. The Suders Standard

In ***Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004),** the U.S. Supreme Court recently articulated the standard for constructive discharge in a sexual harassment case. In *Suders*, a police communications officer alleged sexual harassment and constructive discharge under Title VII. She had resigned from the police force after her supervisors arrested her for theft of her own exam papers, which she stole because her supervisors

were falsely forwarding information about her failing exams. The Court held that in order to establish constructive discharge, a plaintiff must show the existence of a hostile work environment, and that "the abusive working environment became so intolerable that her resignation qualified as a fitting response." The question is whether working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

b. Application of Suders Standard to ADA Cases

Courts are beginning to apply the *Suders* standard in ADA cases. In ***Rooney v. Koch Air, LLC*, 410 F.3d 376 (7th Cir. 2005),** an employee was demoted after being placed on work restrictions following an injury. After suffering another injury, the employee was offered another position with fewer physical requirements but lower pay. The employee rejected the offer and resigned, and filed suit alleging constructive discharge on account of his disability. Relying on *Suders*, the court granted summary judgment for the employer holding that the work conditions did not approach the intolerable levels required for constructive discharge.

c. Constructive Discharge Claims in Failure to Accommodate Cases

In ***Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004),** a Post Office employee with rheumatoid arthritis requested restricted hours and delegated accounting duties as a reasonable accommodation following her promotion. The employer refused, and the employee eventually resigned due to poor working conditions. The employee filed suit under the Rehabilitation Act alleging failure to accommodate and constructive discharge. In denying summary judgment for the employer, the court held that a jury could reasonably infer that USPS knew that by denying the requested accommodations, working conditions could become intolerable to a reasonable person with a disability. Failure to accommodate resulted in the employee working long hours, with the foreseeable consequences of deterioration of health and eventual resignation.

6. Retaliation

Under the ADA it is unlawful for an employer to retaliate against an employee based upon the employee's filing of a charge of discrimination with the EEOC.

a. Who Can Bring Retaliation Claims?

In ***Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183 (3rd Cir. 2003),** the employee claimed she was terminated because she filed an ADA charge with the EEOC. The employer argued that because the employee did not have an ADA disability, that she could not pursue a cause of action for retaliation. The court held that a person's status as a "qualified individual with a disability" is not relevant in assessing the person's claim for retaliation under the ADA.

b. Are Damages Available?

The courts are split over whether an employee can recover damages in an ADA retaliation claim. In addition to limiting damages, plaintiffs may also be denied access to a jury trial if there are no claims in which damages can be awarded.

In ***Kramer v. Banc of America Securities*, 355 F.3d 961 (7th Cir. 2004),** following a demotion, employee with multiple sclerosis filed a charge of ADA discrimination with the EEOC. Six days after her employer learned about the EEOC charge, she was terminated. She then filed a second charge with the EEOC claiming the employer retaliated against her. The Seventh Circuit agreed she could bring a claim based on retaliation under the ADA. However, because of the way that the ADA is structured, the court held that claims under Title V of the ADA, such as retaliation, are limited to injunctive relief. The court also held that since the employee could not recover damages for her retaliation claim, she also did not have statutory right to jury trial.

In ***Johnson v. Bozarth Chevrolet*, 297 F. Supp. 2d 1286 (D. Colo. 2004),** the court held that no monetary relief or jury trial is available for retaliation claims.

In ***Salitros v. Chrysler Corp*., 306 F.3d 562 (8th Cir. 2002),** court upheld jury award of $100,000 in punitive damages for employer's violation of ADA's anti-retaliation provision. (Chrysler did not specifically argue that damages were unavailable under the ADA for retaliation.)

In ***Rhoads v. FDIC*, 2002 WL 31755427 (D. Md. Nov. 7, 2002),** court held that compensatory damages were available in a retaliation claim, but not punitive damages. In holding that compensatory damages were available, the court reasoned that Title VII remedies were applicable to ADA claims, and compensatory damages are clearly available for Title VII violations. In rejecting the availability of punitive damages, the court reasoned that the purpose of punitive damages, which is to punish and deter, does not apply to government agencies.

c. Are Informal Complaints Protected under the ADA?

It is clear that employees with disabilities are entitled to bring a separate claim under the ADA if they are retaliated against after taking some formal action to protect their rights (such as filing a claim with the EEOC). What is less clear is whether retaliation claims are available when an employee makes an informal or internal complaint. A recent decision recognizes the right to a retaliation claim even when an employee does not take a formal action, but instead makes an informal complaint. In ***Wiggen v. Leggett & Platt*, 2004 WL 534449 (N.D. Ill. Feb. 23, 2004),** an employee with migraine headaches complained to the head of the company about her supervisor's denial of a reasonable accommodation request. After making the informal complaint, the employee was terminated. The employee filed suit under the ADA and included a claim for retaliation. The court held that the employee's informal complaints of discrimination amounted to a protected activity and therefore she could proceed with a retaliation claim.

d. Does Retaliation include Coerced Waivers?

In one of the largest ADA retaliation claims ever brought, the EEOC filed suit on behalf of 6000 insurance agents of Allstate Insurance Co. claiming that the employer unlawfully retaliated against the insurance agents by requiring that they sign a release waiving all workplace discrimination rights in order to be retained. The EEOC claimed that the waivers prevented Allstate workers from participating in activities protected by federal

antidiscrimination laws. A federal judge recently voided these coerced waivers on the basis that they constituted unlawful retaliation. ***Romero v. Allstate Insurance Co.*, 2004 WL 692231 (E.D. Pa. March 30, 2004)**

7. Association Discrimination

The ADA provides that people without a disability can file suit if they are treated discriminatorily because of their association with someone with a disability. Although there have been relatively few cases brought under this provision of the ADA, a couple of recent cases address the issue of association discrimination:

In ***Larimer v. International Business Machines Corp*, 370 F. 3d 698 (7th Cir. 2004),** an employee was discharged shortly after his twin daughters returned from a long hospital stay. The employee claimed his employer violated the ADA because of his association with persons with disabilities (*i.e.* his daughters). The Seventh Circuit identified three situations in which a claim of association discrimination can be raised: a) association with someone whose disability is costly to the employer because of health care coverage; b) association with someone that the employer fears will infect the employee because of contact between them or because of a shared genetic component; or c) association with someone whose disability distracts the employee from his work. Because the plaintiff's situation did not fall within any of these categories, the court found that the discharge did not violate the association section of the ADA. It is unclear how the court reached this decision. Neither the ADA, nor its implementing regulations, limits association claims to the three categories articulated by the court. In any event, plaintiffs raising association claims in the Seventh Circuit (Illinois, Indiana and Wisconsin) should try to fit within one of these three categories.

In ***Strate v. Midwest Bankcentre*, 398 F.3d 1011 (8th Cir. 2005),** the court reversed the district court's judgment against an employee who alleged she had been discriminated against because of her association with her child who had Down's Syndrome. The court did not require that she fit within one of the three categories identified in *Larimer*.

8. Evacuation of People with Disabilities

Although most Title III litigation has focused on barriers for people with disabilities to enter places of public accommodation, a recent state court decision indicates that people with disabilities may also have an ADA cause of action if there are barriers to their safe evacuation out of a business.

In ***Savage v. City Place Ltd. Partnership*, 2004 WL 3045404 (Md. Cir. Ct. Dec. 20, 2004),** plaintiff, who uses a wheelchair, was shopping at Marshalls when the store and the mall it was located in were evacuated. Store personnel forced her to exit into an area of the mall that was below ground level and, as a result, she was unable to evacuate because the elevators were shut down and all the exits had stairs. A state court found that Title III of the ADA does apply to the issue of evacuation, and public accommodations must consider the needs of its customers with disabilities when developing emergency evacuation plans. The judge rejected the store's argument that after placing the plaintiff

outside the store's entrance, it was the mall's legal responsibility to address her evacuation needs.

Following the court's ruling, the parties entered into a comprehensive settlement agreement in which Marshalls agreed to redevelop the evacuation procedures at its more than 700 stores located in 42 states and Puerto Rico.

Highlights of the settlement include:

- Certification of emergency exits for people with disabilities;
- Certification of store services in the event of an emergency;
- Written emergency policies and procedures;
- Training on emergency policies and procedures;
- ADA consultants hired for development and implementation of the new policies and procedures; and
- Designation of responsible corporate employee to oversee and coordinate implementation of the terms of the settlement.

9. Movie Theater Accessibility

a. Physical Accessibility

With the increase in the construction of movie theaters using "stadium" seating, there has been a significant number of ADA Title III suits brought against movie theaters for not providing equal access to people with disabilities. Theaters with stadium seating require patrons to climb steps to reach their seats. Unless the theater has an elevator or is designed to provide an accessible entrance within the stadium seating, wheelchair users must sit on the ground level because they cannot reach the tiered seats, which provide a more desirable view of the movie.

At issue is the interpretation of a Department of Justice regulation requiring "comparable lines of sight." However, at least one Circuit Court of Appeal has interpreted this provision to simply require an unobstructed view. Because there is a split in the appellate courts, the Supreme Court may agree to hear a case on this issue. If so, it is likely that a decision by the Supreme Court would apply not just to movie theaters, but to all assembly areas, such as sports arenas, classrooms, concert halls and auditoriums.

- ***Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000)** the court rejected an ADA claim against movie theater with inaccessible stadium seating. The court found that the ADA does not impose a viewing angle requirement and that the common meaning of "lines of sights" did not require theaters to provide patrons who use wheelchairs with anything more than an unobstructed view.
- ***Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), *petition for cert. denied* 124 S. Ct. 2903, (U.S. Jun 28, 2004),** the court held that movie theater violated the ADA by not providing wheelchair users with a comparable view of the screens to patrons who do not use wheelchairs.
- ***U.S. v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003)** the court held that that the Department of Justice regulation requires something more than merely an unobstructed view and ordered the district court to decide the extent to which lines of sight must be similar for wheelchair patrons. The court stated that one of the central

goals of Title III is to provide equal access and enjoyment to people with disabilities. (Following the decision, the Justice Department announced it entered into a consent decree with Cinemark. Under the decree, all future construction of Cinemark theaters will be designed in accordance with plans approved by the Justice Department with wheelchair seating near the middle of the auditorium. Cinemark will also make accessibility improvements to existing theaters.)

b. Communication Access

In addition to physical disability, people who are deaf or hard of hearing have raised claims under the ADA for failure to provide equal communication access in movie theaters.

- ***Ball v. AMC Entertainment,* 246 F. Supp. 2d 17 (D.D.C. 2003).** A federal court refused to dismiss a case brought by a class of individuals who are deaf or hard of hearing claiming that a movie theater chain violated the ADA by failing to provide reasonable accommodations such as captioning and interpretive aids. Following the court's ruling, the parties settled the case and the theater chain will provide a specific number of rear window captioning devices for each theater.
- ***Cornilles v. Regal Cinemas,* 2002 WL 31469787 (D. Or. Mar. 19, 2002).** Plaintiffs who are deaf and hard of hearing sued three movie theater chains seeking rear window captioning. However, the court ruled that the movie theaters could not be compelled to install the captioning because to do so in all of its theaters nationwide would represent an undue burden.
- ***Todd v. AMC Entertainment International* 2004 WL 1764686 (S.D. Tex. Aug. 6, 2003).** Court ruled it would be an undue burden to require movie theaters to provide captioning for movies.
- ***Harvey v. Anschultz Corp. d/b/a Regal Entertainment Group,* (N.J. Super. Ct. Ch. Div. Sept. 15, 2004).** New Jersey Attorney General sued a movie theater company for refusing to install equipment that would make its presentations more accessible to individuals who are hard of hearing. Four other multiplex cinema owners voluntarily agreed to offer captioning to avoid litigation.

c. Companion Seating

Under Title III of the ADA, movie theaters are required to ensure that a companion of a person who uses a wheelchair be given priority in the use of companion seats. 42 U.S.C. 12182(b)(2)(A)(ii) A recent case gave a court the opportunity to define the scope of this provision of the ADA.

In ***Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004),** a person using a wheelchair sued a movie theater company alleging that its policies regarding companion seats during sold-out movies violated the ADA. The theater's policies stated that during sold-out shows, it cannot demand that patrons sitting in seats designated for companions relocate to provide seating for individuals accompanying an individual who uses a wheelchair. The Ninth Circuit found that the theater's policies violated Title III and that the plaintiff's request for a modification of the theater's policies to allow him to sit with his companion was reasonable.

10. Reasonable Modifications in Title II Transportation Cases

Title II of the ADA is divided into two sections. Part A of Title II covers state and local governmental entities and Part B of Title II covers transportation. While Part A specifically states that state and local governments have an obligation to provide reasonable modifications, there is no explicit language regarding reasonable modifications in Part B. As a result, an emerging ADA issue is whether people with disabilities are entitled to a reasonable modification when bringing transportation discrimination cases.

In ***Disabled in Action of Pennsylvania v. National Passenger R.R.*, 2005 WL 1459338 (E.D. Pa. June 17, 2005),** plaintiffs are members of a group comprised of wheelchair users who travel on Amtrak together, typically to political events. For years, Amtrak, with appropriate notice, would create the necessary accessible space by removing fixed seats from train cars. In 2003, however, Amtrak stated that it would no longer remove the seats unless a $200 per ticket fee is paid, in addition to the normal train fare. Plaintiffs filed suit under Title II of the ADA. The court held that since Part B of Title II states specifically how many spaces for passengers using wheelchair must be available on each train, no additional requirement can be imposed. The court found that public transportation entities are exempt to the reasonable modification requirements of Part A of Title II with respect to matters specifically governed by Part B, including the number of accessible seats.

In ***Melton v. Dallas Area Rapid Transit,* 391 F.3d 669 (5th Cir. 2004),** parents of disabled adult passenger brought suit alleging that public paratransit service's failure to modify its paratransit services to require alley pick-up for passenger violated Americans with Disabilities Act. The 5th Circuit held that the Title II of the ADA does not require a paratransit provider to make reasonable modifications to its services. (Interestingly, the Department of Transportation recently issued Guidance stating that transit agencies must provide paratransit services in a way that goes beyond "curb to curb service" if necessary to actually get the passenger from point of origin to destination.)