ADA Legal Update
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A. Definition of Disability

1. ADA Restoration Act

On September 29, 2006, House Judiciary Committee Chairman F. James Sensenbrenner, Jr. (R-Wis.) and House Minority Whip Steny H. Hoyer (D-Md.) introduced H.R. 6258, entitled the "Americans with Disabilities Act Restoration Act of 2006." The bill's sponsors characterize it as bipartisan legislation that seeks to restore protections originally intended by the ADA that have been lost as a result of decisions by the U.S. Supreme Court. Specifically, the bill seeks to amend the ADA so that the focus will be on the discrimination that people with disabilities experience rather than on having to prove that they fall within the intended scope of the ADA.

2. Mitigating Measures

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

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. Cases Where Mitigating Measure Resulted in Dismissal of ADA Case

In ***Collins v. Prudential Investment and Retirement Services*, 119 Fed. Appx. 371, (3rd Cir. 2005),** an employee with ADHD failed to maintain her discriminatory discrimination claim because she was only moderately limited in a major life activity. The court held that her ADHD was controlled by medication and thus, she did not have an actual disability under the ADA.

In ***Godfrey v. New York Transit Authority*, 2006 WL 2505223 (E.D.N.Y. Aug. 28, 2006),** a person applied for a job, but his application was placed on hold while the employer decided whether to require a field test because of concerns that his hearing impairment could pose a danger to the public. Applicant sued under the ADA claiming it was discrimination to place his application on hold for 12 weeks. Court ruled he did not have an ADA disability because with the use of a hearing aid he was not substantially limited in the major life activity of hearing.

In ***Rossi v. Alcoa, Inc.*, 129 Fed.Appx. 154 (6th Cir. 2005),** an employee with sleep apnea failed to maintain his ADA claim because he was unable to demonstrate his condition substantially limited a major life activity. The court held that his condition was controlled by medication.

c. Cases where Mitigating Measure Did Not Result in Dismissal of ADA Case

In ***Talbot v. Acme Paper & Supply Co.*, 2005 WL 2090699 (D. Md. August 30, 2005), *affirmed, Talbot v. Acme Paper and Supply Co.*, 173 Fed.Appx. 219 (4th Cir. 2006),** 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.

In ***Bley v. Bristol Township School District,* 2006 WL 220669 (E.D. Pa. Jan. 25, 2006),** plaintiff with epilepsy had worked as a temporary custodian at a school for five years and had applied for as many as 30 positions with the school district. However, she was never hired as a permanent employee and she alleged it was because of her disability. Employer challenged whether she had an ADA disability in light of the medications she took for her epilepsy. The court held that plaintiff may establish that epilepsy constitutes a disability for purposes of the ADA despite the mitigating effect of the medications if she experiences unpredictable seizures that leave her substantially limited in her ability to walk, think, and talk during and shortly after a seizure.

d. No ADA Disability When Impairments Potentially Could Be Mitigated

ADA coverage has been denied to plaintiffs who have substantially limiting impairments, but whose impairments arguably *could* be mitigated by medication or other measures. Although these plaintiffs are substantially limited in major life activities, courts have ruled that these plaintiffs have not availed themselves of medication or other corrective devices, and thus, are not entitled to the ADA's protections. These cases ignore the Supreme Court's requirement that plaintiffs be evaluated as they currently are and not how they may be in a mitigated state.

In ***Atwell v. Hart County, Ky*, 122 Fed. Appx. 215 (6th Cir. 2005),** a prisoner with mental illness and substance abuse alleged failure to accommodate after refusing to take medications and subsequently injuring himself while experiencing hallucinations and delusions. The court affirmed summary judgment for the jail, holding that if a condition could be mitigated or controlled by medication, it does not substantially limit a major life activity, even if the person does not take the medication.

3. Major Life Activities

a. Background

To be covered under the ADA, a plaintiff has to demonstrate that a physical or mental impairment substantially limits a major life activity. Since Congress intentionally did not establish a finite list of major life activities, courts are continuing to decide whether something qualifies as a major life activity under the ADA.

b. Interacting with Others

In ***Battle v. Mineta,* 387 F.Supp.2d 4 (D.D.C. 2005)** the court granted summary judgment for the employer, holding that the inability to interact with others due to anxiety disorder did not make him a qualified individual with a disability under the Rehabilitation Act. The court concluded that interacting with others was not a major life activity. (*But see, **Bell v. Gonzales,* 398 F.Supp.2d 100 (D.D.C. 2005),** where a court held that interacting with others was a major life activity.)

c. Elimination of Bodily Fluids

In ***Heiko v. Colombo Savings Bank,* 434 F.3d 249 (4th Cir. 2006),** the court reversed summary judgment for an employer who allegedly failed to promote an employee with end-stage renal disease, holding that the elimination of bodily waste is a major life activity. The court defined major life activity as an activity of central importance to daily life, and the elimination of bodily waste is a daily activity of life-sustaining importance.

d. Sterility

In ***Yindee v. CCH, Inc.*, 2006 WL 2328695 (7th Cir. Aug. 11, 2006),** the court found, in a case in which the plaintiff's cancer led to a hysterectomy, that although she no longer had cancer at the time of the termination, the sterility caused by treating cancer rendered her substantially limited in a major life activity (i.e. reproduction). Therefore, she was covered by the ADA, relying on the Supreme Court's decision in ***Bragdon v. Abbott,* 524 U.S. 624 (1998)**.

e. Eating

In ***Downs v. AOL Time Warner Inc.*, 2006 WL 162563 (S.D. Ohio Jan. 20, 2006),** employee with diabetes sued under the ADA after the employer failed to provide a requested reasonable accommodation. Plaintiff claimed he was covered by the ADA because he was substantially limited in the major life activity of eating as he could not eat when or what he wanted. The court found that a reasonable jury could decide that the plaintiff was substantially limited in his ability to eat, as he had to maintain a consistent eating schedule to control his diabetes.

B. Essential Functions

In order to be covered by the ADA, an individual has to have an ADA disability and be "qualified." To be qualified under the ADA, people with disabilities must be able to show that they:

- Have the requisite skills, experience, education, licenses, etc.; and
- Are able to perform the essential functions of the job, either with or without a reasonable accommodation.

Many cases are being decided based on whether a particular function is deemed essential:

In ***Taylor v. Rice,* 451 F.3rd 898 (D.C. Cir. 2006),** employer took the position that plaintiff with HIV was not qualified to be a Foreign Officer because he could not perform the essential functions of the job with or without an accommodation. The employer argued that worldwide availability was an essential function of the job, and the plaintiff's

HIV prevented him from being able to work in any post worldwide due to the greater risk of contracting disease and insufficient medical care in certain parts of the world. The D.C. Circuit Court of Appeals found that the case should continue because there was a question of fact whether the accommodation requested would indeed result in the elimination of an essential job function.

In ***Clarke-Kurek v. North Allegheny School District,*** **2006 WL 1073158 (W.D. Pa. Mar. 27, 2006),** court ruled that a school district was justified in terminating teacher with kidney disease who could not work a full school day. Court held that working a full school day was an essential job function and school was not required to eliminate an essential function of the job.

In ***Puckett v. Park Place Entertainment Corp.,*** **2006 WL 696180 (D. Nev. Mar. 15, 2006),** a cocktail waitress with multiple sclerosis requested to use a drink cart since she could no longer carry a drink tray weighing up to 30 pounds. Lifting and carrying were not listed as an essential job function in the job description. The employer argued that the drink cart would not be practical in a crowded bar setting and that carrying drinks without a cart was an essential function of the job that could not be eliminated. The court held that a reasonable jury could find that carrying a tray was not an essential function and that the waitress could perform the job with the use of a drink cart.

In ***Turner v. Hershey Chocolate USA,*** **440 F.3d 604 (3d Cir. 2006),** court ruled that whether rotating positions was an essential job function is a factual question precluding summary judgment as the rotation system was not part of the written job description or the collective bargaining agreement. The court also relied on the fact that the rotation system was new and workers had not rotated in the past. (*But see* ***Rehrs v. Iams Co.,*** **2006 WL 296591 (D. Neb. 2006),** finding that working a rotating shift was an essential function and employer was not required to modify to accommodate employee with diabetes.)

In ***Boone v. Rumsfeld,*** **172 Fed. Appx. 268 (11th Cir. 2006),** an employee successfully challenged his employer's assertions that his medical restrictions prevented him from performing essential functions of an equipment repairer. The employer argued that plaintiff was not qualified because his medical condition prevented him from heavy lifting, bending, and twisting, which were included in his job description. However, plaintiff presented evidence that these were not essential to the job, because other equipment repairers did not lift heavy items, bend, or twist. Moreover, evidence showed that the employer allowed other equipment repairer with similar medical conditions to perform lighter duties.

C. Medical Examinations and Inquiries

1. <u>Prohibition Against Exams and Inquiries Prior to Conditional Offer of Employment</u>
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.

In ***Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005),** the court reversed the lower court's granting of summary judgment in the case of three HIV-positive applicants who alleged the employer conducted unlawful medical examinations during the application process by extending a job offer contingent on results of a medical examination. The court held that employers could only conduct medical examinations as the last step of the application process and only after making a real job offer.

2. Confidentiality of Information Obtained from Medical Inquiries

Section 12112(d)(3)(B) of the ADA requires that the information obtained regarding the medical condition or history of an applicant is to be collected and maintained on separate forms, kept in separate medical files, and treated as a confidential medical record.

In ***Cripe v. Mineta,* 2006 WL 1805728 (D.D.C. June 29, 2006),** the attorney of an employee with HIV sent a letter to the employer regarding work accommodations. The employer failed to keep the letter confidential (the letter was sitting on a desk without an envelope) and, as a result other employees learned of the plaintiff's HIV status. The court rejected the employer's argument that the information did not have to be protected since it was not marked as confidential.

D. Direct Threat

1. Background

Under the ADA, an employer may exclude someone from a job if that person would pose a "direct threat" – i.e. a significant risk of substantial harm to health or safety that cannot be eliminated by a reasonable accommodation. The employer must base a direct threat decision 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.

2. Recent Direct Threat Cases

In ***Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005),** the court affirmed summary judgment for the employer who did not rehire an employee with insulin-dependent, Type 1 diabetes after a pre-employment physical revealed his diabetes was not under control. The court held that an employee is not qualified for a position if his disability poses a direct threat to his safety or the safety of others, and that in this case the court found that uncontrolled diabetes in a manufacturing plant with dangerous machinery could cause serious injury.

In ***Rodriguez v. ConAgra Grocery Product Co.*, 436 F.3d 468 (5th Cir. 2006),** a job applicant with diabetes was denied employment because of a belief that he would be a direct threat in the workplace when his glucose level was found to be high. The court denied the defendant's motion for summary judgment holding that the generalizations and false beliefs by the person in charge of hiring were contrary to the ADA's mandate to conduct an individualized, independent assessment.

In ***Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006),** the court ruled that there was a genuine material issue of fact as to whether an employee with epilepsy was a direct threat

in the workplace following a seizure while driving. Employer needed to explore whether a reasonable accommodation, such as job reassignment or temporary medical leave, would be available to eliminate the alleged threat in the workplace.

In ***Macy v. Hopkins County Board of Education,* 429 F. Supp. 2d 888 (W.D. KY 2006),** a teacher with post-concussion syndrome allegedly made threats to members of the boys basketball team, telling them that she would kill them if she heard them making fun of the girls. The teacher claimed that the alleged threat was merely an outburst of anger, which was a symptom of her disabling condition. The district court concluded that the ADA only protects "qualified employees," and the teacher's threats to kill students disqualified her from being a teacher.

3. Direct Threat to Self?

Although the language of the ADA restricts direct threat to cases in which the person poses a threat to others, the U.S. Supreme Court found that direct threat also includes situations when the employee's disability poses a threat to himself/herself.

In ***Chevron v. Echazabal,* 536 U.S. 73 (2002),** 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. The Supreme Court held that direct threat included "threat to self."

In ***Taylor v. Rice,* 451 F.3rd 898 (D.C. Cir. 2006),** plaintiff's application to be an officer with the Foreign Service was rejected because of his HIV status. The State Department has a policy prohibiting the hiring of people with HIV for these positions, claiming that they may require medical treatment that is not available in less-developed countries where they might be stationed. Relying on *Echazabal,* the trial court held plaintiff would potentially be a direct threat to himself if he were hired and deployed to a place that could not meet his medical needs. The D.C. Circuit court reversed finding that there may be reasonable accommodations that would be able to reduce the alleged direct threat so that there was not a substantial risk of significant harm to the plaintiff's health.

E. Reasonable Accommodation Issues

1. Interactive Process

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

In ***Cutrera v. Louisiana State University,* 429 F.3d 108 (5th Cir. 2005),** the court reversed summary judgment against an employee because there was evidence the university did not properly consider possible accommodations as part of the interactive process. The court held that a jury should decide who was responsible for the breakdown in the interactive process, as an employer cannot block the accommodation process by preemptively terminating an employee before an accommodation can be considered.

In ***Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006)**, the court declined to grant summary judgment for the employer, holding that whether the employer participated in the interactive process to determine reasonable accommodations after learning that the employee was legally blind was an issue for the jury. The court stated that in order to establish that the employer failed to engage in the interactive process, the employee must show (1) he is disabled, (2) he requested accommodations, (3) the employer did not assist him in seeking accommodations, and (4) he could have been reasonably accommodated but for the employer's lack of good faith.

In ***Serio v. New Wisconsin Services,* 2006 WL 2435077 (E.D. Wis. Aug. 22, 2006),** body shop technician who is hard of hearing filed suit under the ADA after his employer failed to provide requested interpreter. The court allowed the case to go to trial after it was shown that the employer did not engage in the interactive process following the accommodation request.

2. Leave as a Reasonable Accommodation

Courts have differed on how leave from work is treated as a reasonable accommodation under the ADA.

In ***EEOC v. Sears, Roebuck & Co.*, No. 04-cv-7282 (N.D. Ill. 2005),** a court allowed a class action to proceed when employer had a policy of automatically terminating employees with disabilities without regard to their individual circumstances and prospects of returning to work after spending more than a year on disability leave.

In ***Lara v. State Farm Fire & Casualty Co.*, 121 Fed. Appx. 796 (10th Cir. 2005),** an employee with back injuries failed to sustain a claim that State Farm should have provided a reasonable accommodation of additional leave time instead of terminating him. The court held that an employer may not be required to provide additional leave as a reasonable accommodation when the employee fails to provide information on the expected duration of his impairment and the employer thus lacks the knowledge needed to evaluate the reasonableness of the request.

In ***Altendorfer v. Kroll Ontrack, Inc.*, 2006 WL 1314318 (D. Minn. May 12, 2006)**, the court held that, although an unpaid leave can be a reasonable accommodation under appropriate circumstances, a second unpaid leave was not reasonable where the employee was both unable to work and unable to specify when she would be able to return to work.

3. Reasonable Accommodations in Association Discrimination Cases

In ***Overley v. Covenant Transport, Inc.*, 178 Fed. Appx. 488 (6th Cir. 2006),** a truck driver who was denied a modified work schedule to care for her daughter with disabilities filed an ADA suit based on association discrimination. In ruling for the employer, the court held that, although the ADA protects workers from discrimination on the basis of association with an individual with a disability, it does not require employers to reasonably accommodate such a worker.

4. Job Related vs. Personal Items

Generally, an employer is not required to provide personal items used outside of the workplace as a reasonable accommodation. However, an employer may have to provide items that assist the person with the disability in performing the essential functions of the job.

In ***Liss v. Nassau County*, 425 F.Supp.2d 335 (E.D.N.Y. 2006),** an employee with multiple sclerosis requested that his employer provide, as a reasonable accommodation, a "cooling jacket" when he was working outdoors in hot temperatures. The employee provided his employer with numerous doctors' notes supporting his request. The employer denied the request and plaintiff sued under the ADA. The employer argued that a cooling jacket is a personal use item that the employer is not required to provide. The court found that the employee needed the cooling jacket for work only, and since the cooling jacket was job related and not a personal use item, it could be a reasonable accommodation under the ADA.

5. Anti-Discrimination Policy Not Enough to Avoid Punitive Damages

In ***E.E.O.C. v. Federal Express Corp.*, 2006 WL 1134208 (D. Md. April 20, 2006),** the court upheld a jury's $100,000 punitive damages award for an employee who claimed the employer failed to accommodate his disabilities. Employer argued that its company-wide anti-discrimination policy demonstrated that it made a good-faith effort to comply with the ADA. However, the EEOC presented evidence that employer's managers were unaware of the company's policy on employees with disabilities. The court determined that, although an employer may avoid punitive damages by demonstrating that it made a good-faith effort to comply with the ADA, merely having an anti-discrimination policy is insufficient.

F. Disability Harassment

1. Background

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:

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

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

2. Cases Dismissing Disability Harassment Claim

In ***Ray v. New York Times Management Services,*** **2005 WL 2467134 (M.D. Fla. Oct. 6, 2005),** the court granted summary judgment for the employer, holding that an employee with hepatitis C failed to show that the discriminatory conduct created a hostile work environment. The employee's evidence failed to demonstrate numerous, specific incidents which unreasonably interfered with his working conditions. Disclosing an employee's medical condition to co-workers does not necessarily create a hostile work environment.

In ***Ferraro v. Kellwood Co.,*** **440 F.3d 96 (2d Cir. 2006),** an employer was not liable for its supervisor's harassing behavior when it exercised reasonable care to prevent and promptly correct discriminatory behavior and the employee complaining of harassment failed to avail herself of the preventative opportunities provided by the employer.

In ***Mason v. Wyeth, Inc.,*** **2006 WL 1526601 (4th Cir. May 31, 2006),** an employer was not liable for disability harassment when the plaintiff failed to show that his manager's pranks were motivated by his hearing impairment, despite the fact that evidence showed that the manager specifically exploited the plaintiff's inability to hear by sneaking up on him and that, while the manager played pranks on other employees, the manager played more frequent pranks on the plaintiff.

In ***Rozier-Thompson v. Burlington Coat Factory Warehouse,*** **2006 WL 1889651 (E.D. Va. Jul. 7, 2006),** plaintiff filed suit for disability harassment after her supervisor made several disability related comments (supervisor called her "crippled", said she "should quit and go on disability," called her "stupid for trying to have a baby," and that she was "no good for the company.") The court rejected plaintiff's claims because they were made over a two year period, and were not "physically threatening" or the "type of deeply repugnant, humiliating treatment prohibited by the ADA."

In ***Robinson v. Veneman,*** **2006 WL 2474148 (D.D.C. Aug. 25, 2006),** court held that isolated comments about an employee's leave practices and health were not enough to establish disability harassment. The court stated that a hostile work environment is one that is "permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive" to alter the conditions of employment.

3. Cases Allowing Disability Harassment Claim to Proceed

In ***Spencer v. Wal-Mart Stores, Inc.,*** **2005 WL 697988 (D. Del. Mar. 11, 2005),** the court affirmed the jury's award of $12,000 damages for emotional distress to a hard of hearing employee for claims of hostile work environment and failure to accommodate. The court found evidence that her supervisor and other employees yelled at her, refused to facilitate communications with her, and used obscene gestures directed towards her supported the jury's determination of a hostile work environment.

In ***EEOC v. Luby's, Inc.,*** **2005 WL 3560616 (D. Ariz. Dec. 29, 2005),** a floor attendant with a mental impairment was allowed to move forward with her hostile work environment claim against the employer restaurant. The employee alleged she was

subjected to repeated name-calling, barking, and threats of violence, which may establish a hostile working environment.

In ***Arrieta-Colon v. Wal-Mart Stores,* 434 F.3d 75 (1st Cir. 2006),** the court upheld a $230,000 jury verdict in case where the employer did not take action against harassment employee with Peyronie's Disease experienced because of his penile implant. Employee was subjected to repeated teasing and harassment by co-workers and managers about his condition, including over the store's paging system. Co-workers testified that supervisors knew about the harassment and failed to prevent it. Employer cannot shield itself from liability by relying on a grievance policy that is not consistently used.

In ***Quiles-Quiles v. Henderson,* 439 F.3d 1 (1st Cir. 2006),** the court found that evidence was sufficient for the jury to find a hostile work environment where employee was subject to such constant ridicule about his depression that he was hospitalized and eventually withdrew from the workforce. The court rejected the argument that it was the sort of conduct common in "blue-collar" workplaces, and while it was inappropriate, the conduct did not constitute a hostile work environment.

G. Retaliation

Under the ADA, it is unlawful for an employer to retaliate against an employee based upon the employee's efforts to exercise his or her civil rights.

1. U.S. Supreme Court Clarifies the Standard in Retaliation Cases

In ***Burlington Northern & Santa Fe Railway Co.,* 126 S.Ct. 2405 (2006),** plaintiff was the only female forklift operator in Burlington Northern's maintenance department in the Memphis office. After complaining of gender discrimination, she was reassigned to a less desirable laborer position. She then filed a charge with the EEOC about the demotion. Subsequently, she was accused of insubordination toward a supervisor and suspended without pay. More than a month later, the company found she had not been insubordinate, reinstated her and awarded her back pay. She then sued Burlington Northern for retaliation based on the transfer and the suspension. The U.S. Supreme Court ruled that suspending plaintiff and transferring her to a less desirable job independently established an actionable retaliation claim. Previously, some courts had ruled that a plaintiff could only bring a retaliation claim if it involved an "ultimate employment decision" such as a firing. The Supreme Court held that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making a charge of discrimination could be the basis for a retaliation claim. Although the Supreme Court decision was a gender discrimination case, it is likely that judges will apply the same standard in ADA cases.

2. Are Damages Available?

The courts are split over whether an plaintiffs 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.

***Edwards v. Brookhaven Science Associates, LLC,* 390 F.Supp.2d 225 (E.D.N.Y. 2005),** the court held that a security police officer could pursue compensatory damages for his claim of termination in retaliation for his administrative complaint of discrimination. The court reasoned that because compensatory damages are available under Title I of the ADA, they are also available for employment-related retaliation claims.

In ***Cantrell v. Nissan North America,* 2006 WL 724549 (M.D. Tenn. Mar. 21, 2006),** the court held that although there is no logic in a rule that precludes compensatory and punitive damages in an ADA retaliation case, where they are allowed in a Title VII retaliation case, any expansion of the plain language of Section 1981a should come from Congress, not the courts.

H. "Regarded As" Cases

1. Background

If an employee is "regarded as" having a physical or mental impairment that substantially limits a major life activity, the employee has a disability under the ADA. Whether an employee is deemed to be within the "regarded as" prong of the definition of disability has been the subject of a great deal of litigation and courts vary widely on the interpretation of this provision of the ADA.

2. Cases Denying "Regarded As" Claim

In ***Pence v. Tenneco Automotive Operating Co. Inc.*, 169 Fed. Appx. 808 (4th Cir. March 7, 2006),** the court ruled that an employer's referral for psychological evaluation after the employee made threats of violence towards coworkers does not signify that the employer regarded the employee as having a mental disability under the ADA.

In ***Wenzel v. Missouri-American Water Co.*, 404 F.3d 1038 (8th Cir. 2005),** the court ruled that an employer's mistaken belief that an employee's lifting restriction was permanent did not mean it regarded him as disabled. The employer placed the employee on medical leave, but the court reasoned that perception that an employee is unable to work a particular job does not constitute a disability under the ADA.

In ***Lucas v. Methodist Hospital, Inc.*, 2006 WL 1307452 (7th Cir. May 4, 2006),** the Court found that while supervisor's comments showed that the Hospital regarded Lucas as physically unable to perform the job for which they were interviewing for, that inability to perform one job did not show employee had an actual disability or was regarded as having a disability with respect to a broad class of jobs. Evidence that the defendant gave plaintiff a pass to use parking spaces reserved for disabled employees was not sufficient to prove that she was regarded as disabled.

3. Cases Upholding "Regarded As" Claim

In ***Todd v. Cincinnati*, 436 F.3d 635 (6th Cir. 2006),** plaintiff, a former police officer, was granted a disability pension due to degenerative disc disease. A few years later he applied to be a firearms instructor with the police department. Officials interviewing him expressed doubts about whether he could perform the

job due to his back injury and he was not hired. The court found that plaintiff could proceed with his ADA claim under a "regarded as" theory.

In ***Rodriguez v. ConAgra Grocery Products Co.*, 436 F.3d 468 (5th Cir. 2006),** court ruled that an employer regarded plaintiff with diabetes as disabled and violated the ADA by denying him a job because of wrongful and stereotypical assumptions about his diabetes. The employer's doctor, as well as the person making the hiring decision, believed the plaintiff would experience dizziness and black-outs, based not on his past history, which they had never reviewed, but based on assumptions about "uncontrolled" diabetes.

I. Suing the State Under Title II – Is the State Immune?

1. Background

The 14th Amendment to the U.S. Constitution permits Congress to pass laws to address discriminatory actions by states. However, the 11th Amendment has been interpreted to provide states with immunity from private lawsuits for money damages in federal court unless the federal legislation remedies or prevents a problem of unconstitutional state action, and the legislation is deemed proportional and a reasonable response to the problem it is intended to remedy or prevent. In recent years, the Supreme Court has interpreted the states' immunity under the 11th Amendment quite broadly, including holding that states are immune from ADA employment discrimination suits seeking money damages, ***Garrett v. University of Alabama,* 531 U.S 356 (2000).**

2. Supreme Court Reviews Constitutionality of Title II of the ADA

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 ***State of Tennessee v. Lane,* 541 U.S. 509 (2004)** to decide whether Congress acted properly when it made states subject to suits in federal court under Title II of the ADA.

Facts of Tennessee v. Lane

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.

Legal Arguments

In response to the ADA suit, the State of Tennessee argued that 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. 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.

Supreme Court's Ruling

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. 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 documented 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 contained broad statements about the careful tailoring of Title II's requirements generally.

3. Recent Lower Court Interpretations of Tennessee v. Lane

a. Prisons:

In ***U.S. v. Georgia,* ___ U.S. ___, 126 S.Ct. 877 (2006),** the United States Supreme Court said that an inmate could bring a Title II case against the State for money damages when the conduct by the State violates the Due Process Clause of the 14th Amendment. While the full Court agreed that damages were available against States for disability discrimination that also violates the Constitution, there was a split among the Justices as to whether damages are available for ADA violations that are not constitutional violations. The Court remanded the case to the lower court to identify which conduct by the State would violate the ADA but not the Constitution.

In ***Hallett v. New York State Dept. of Correctional Services,* 2006 WL 903200 (S.D.N.Y. Apr. 7, 2006),** plaintiff, a former prison inmate, sought damages due to his denial of participation in prison programs, violating Title II of the ADA. The plaintiff used a wheelchair and prison officials told him he could not participate in certain prison programs because "they don't take wheelchairs." The court found that the actions of the defendants could have involved discriminatory animus, which meant the defendants may have violated the Fourteenth Amendment and therefore were not entitled to sovereign immunity.

In ***Degrafinreid v. Ricks,* 417 F.Supp.2d 403 (S.D. N.Y. 2006),** prison officials destroyed and failed to replace a prisoner's hearing aids, the court found that prison officials may have violated his Constitutional rights and allowed him to pursue his ADA claim requesting monetary damages against state officials.

In ***Casarez v. County of San Benito,* 2006 WL 83055 (N.D. Cal. Jan. 12, 2006),** plaintiff, an incarcerated individual with a right leg below-knee amputation who

wears a prosthesis, alleged the jail failed to provide an accommodation that would make the shower less slippery and less dangerous for him and other inmates with amputations. The court held that a jury could find that the jail officials acted with deliberate indifference because they did not conduct a fact-specific investigation or engage in meaningful interaction with the plaintiff to determine a reasonable accommodation. A public entity has a duty to undertake a fact-specific investigation to determine a reasonable accommodation once it becomes aware of an individual's need for an accommodation. Because the jail failed to engage in this investigation, the court held the jail could be liable for monetary damages.

b. Education:

In ***Pace v. Bogalusa City School Board*, 403 F.3d 272 (5th Cir. 2005),** a student with cerebral palsy sued the state for lack of accessible facilities at the school. The court held that the state of Louisiana knowingly waived 11th Amendment immunity to Section 504 by accepting federal funds. The court reasoned that because Congress made waiver of 11th Amendment immunity a clear condition of accepting federal funds, a state could not then argue it did not knowingly waive its immunity. The test is whether Congress made a clear statement, not the state's subjective beliefs.

In ***Doe v. Bd. of Trustees of the University of Illinois*, 429 F.Supp.2d 930 (N.D. Ill. 2006),** a former M.D./Ph.D student argued that the University of Illinois failed to reasonably provide requested accommodations. The district court dismissed his ADA claim, finding that the reasoning in *Lane* did not extend to education because education is not a fundamental Constitutional right. However, the court allowed Doe's ADA claims for injunctive relief against the individual defendants in their official capacities to proceed.

In ***Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006),** plaintiff, a college student diagnosed with a mental illness, alleged that the University of Puerto Rico failed to reasonably accommodate him and discriminated against him. The First Circuit ruled that the Supreme Court's reasoning in *Lane* should be extended to access to public education and the state should not be entitled to sovereign immunity.

c. Disability Services:

- ***Bill M. v. Nebraska Dept. of Health and Human Services Finance and Support*, 408 F.3d 1096 (8th Cir. 2005), vacated, *U.S. v. Nebraska Dept. of Health and Human Services Finance and Support*, ___ U.S. ___, 126 S.Ct. 1826 (2006),** 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. However, the Supreme Court vacated the Eighth Circuit's opinion and remanded for further consideration in light of the Court's opinion in *U.S. v. Georgia*.

J. Community Integration Litigation

1. Background

When Congress passed Title II of the ADA it found that isolation and segregation was a pervasive form of discrimination and that discrimination against people with disabilities included people in institutional settings. The U.S. Department of Justice was designated by Congress to enforce and issue regulations for Title II. DOJ Regulations state that state and local governments must provide their services to people with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities and that state and local governments must make reasonable modifications in the services it provides unless those modifications would result in a fundamental alteration.

2. Supreme Court Reviews Community Integration Under Title II of the ADA

In 1999, the U.S. Supreme Court agreed to hear its first case addressing community integration under Title II of the ADA. The case was ***Olmstead v. L.C.*, 527 U.S. 581 (1999)** and involved two women with mental retardation and mental illness who 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.

3. Recent Interpretations:

a. 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.

In ***Arc of Washington v. Braddock*, 427 F.3d 615 (9th Cir. 2005)**, plaintiffs sued Washington state officials for failing to provide sufficient community services under its Home and Community Based Services Medicaid waiver program. The 9th Circuit held that Washington demonstrated that it has a "comprehensive effectively working plan" as

contemplated by *Olmstead*, and therefore were not in violation of the ADA. Specifically, the court found Washington's HCBS program is (1) sizeable, with a cap that has increased substantially over the past two decades; (2) full; (3) available to all Medicaid-eligible disabled persons as slots become available, based only on their mental-health needs and position on the waiting list. The court also found that Washington had already significantly reduced the size of the state's institutionalized population; and experienced budget growth in line with, or exceeding, other state agencies. Under such circumstances, the court held that forcing the state to apply for an increase in its Medicaid waiver program cap constitutes a fundamental alteration, and is not required by the ADA.

In ***Lovey H. v. Eggleston*, 235 F.R.D. 248 (S.D.N.Y. 2006),** welfare recipients with disabilities sought injunctive relief under the ADA and Rehabilitation Act due to a proposed change in the administration of public benefits by New York City. Instead of providing benefits through its 29 neighborhood offices, the City proposed to provide these services only through three central offices. Following the reasoning in *Olmstead*, the court granted injunctive relief because it found that the City's proposal violated the mandate that persons with disabilities are given the opportunity to participate in mainstream service delivery mechanisms.

b. Risk of Institutionalization

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

In ***Nelson v. Milwaukee County*, 2006 WL 290510 (E.D. Wis. Feb. 7, 2006)**, plaintiffs, who are persons over the age of sixty and with disabilities, brought a class action under the ADA alleging inadequate funding of service providers by the defendants in its community based services program, and as a result plaintiffs would be forced into more restrictive settings to receive services. The court allowed the plaintiffs claim to go forward under the reasoning that they were at risk of institutionalization. The court found that the inadequate compensation of community services would result in unjustified segregation, violating the ADA and the Rehabilitation Act.

In ***Ligas v. Maram*, 2006 WL 64474 (N.D. Ill. Mar. 7, 2006),** plaintiffs filed ADA community integration suit on behalf of people with developmental disabilities currently in large private institutional settings as well as those who were at risk of institutionalization in those facilities. The court granted plaintiffs' class certification motion finding that the class included people with developmental disabilities who are currently institutionalized as well as those who are at risk of being institutionalized.

K. Parking Placard Surcharge

1. Background

Under the ADA's regulations, "a public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility that are

required to provide that individual or group with the nondiscriminatory treatment required by the Act."

2. <u>Court Rules that Parking Placard Surcharge Violates Title II of the ADA</u>

In ***Klingler v. Missouri Department of Revenue,* 433 F.3d 1078 (8th Cir. 2006),** individuals with disabilities sued the State of Missouri alleging that it violated Title II of the ADA by charging a fee for removable disability parking placards. The court agreed with the plaintiffs and held that Missouri was in violation of the ADA. The court rejected that Missouri met the ADA's requirements by providing its disability license plates at no cost since the license plate could only be obtained by owners of vehicles that were operated at least 50% of the time by the physically disabled person or used primarily to transport physically disabled members of the owner's household. Therefore, a removable placard was necessary for an individual who did not own a vehicle or did not ride in a vehicle that met these requirements. Note: Because the 8th Circuit previously held that money damages against the state are only available in court access cases (see *Bill M.* case above), the plaintiffs were only entitled to injunctive relief in this case, i.e. the removal of the surcharge. However, the court recently revisited its decision to deny plaintiffs monetary damages in light of a recent Supreme Court decision, which held that whether plaintiffs are entitled to recover money damages from the State depends on a claim-by-claim analysis (See *Goodman v. Georgia*, discussed above). Upon review, the court upheld its decision to deny plaintiffs money damages, finding that the State's conduct, although in violation of the ADA, was not unconstitutional. ***Klingler*, 455 F.3d 888 (8th Cir. 2006)**

In ***Keef v. Nebraska Dept. of Motor Vehicles*, 716 N.W.2d 58 (Neb. S.Ct. 2006)**, individuals with disabilities sued the State of Nebraska for both injunctive relief and money damages, alleging the State violated Title II of the ADA by charging a $3 fee for removable disability parking placards. The Nebraska Supreme Court did not address the plaintiffs' claim for an injunction because the State had stopped charging the fee for the placards prior to the court's consideration of the issue. As for money damages, the court held that plaintiffs were not entitled to recovery of the placard fee. The court determined that the fee did not deny individuals of a fundamental right, nor was there evidence that Congress was specifically concerned about fees for placards when it enacted the ADA. Therefore, the court held that the State was immune from suit for recovery of the parking placard fee.

L. ADA's Application to Websites

The ADA does not explicitly discuss whether it applies to websites, and thus far, there have been few cases. Over the years, courts have reached different conclusions as to whether websites are covered under the ADA. (See ***Martin v. Metropolitan Atlanta Rapid Transit Authority,* 225 F. Supp. 2d 1362 (N.D. Ga. 2002),** holding that transit authority's website is covered by Title II of the ADA and ***Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *aff'd on other grounds,* 385 F.3d 1324 (11th Cir. 2004),** holding that airline's website was not covered by Title III of the ADA because the website does not exist in any particular geographical location.)

A recent case has once again raised this issue and may result in more litigation as to website accessibility. In ***National Federation of the Blind v. Target Corporation,* 2006 WL 2578282 (N.D. Cal. Sept. 6, 2006),** an advocacy group for blind people claimed Target violated Title III of the ADA because its website was inaccessible. In denying Target's Motion to Dismiss, the judge concluded that to the extent that plaintiffs alleged that the inaccessibility of target.com impeded the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs stated an ADA claim. The court also found that Target treats target.com as an extension of its stores and as part of Target's overall integrated merchandising efforts.

M. Association Discrimination under Title II

1. Background

Under the ADA, people who are discriminated because of their association with a person with a disability can state a cause of action. Typically, association discrimination cases have arisen in the context of employment under Title I. However, several recent cases have explored the application of association discrimination in the context of Title II.

2. Is An Association Discrimination Claim Viable Under Title II?

In ***Barber v. Colorado,* 2005 WL 2657885 (D. Colo. Oct. 17, 2005),** the court dismissed claims by two daughters of a person with low vision, holding that Title II of the ADA does not support claim of association discrimination. The court reasoned that unlike Title I, Title II does not expressly authorize claims based on associational discrimination. However, the court subsequently clarified its decision after plaintiffs amended their complaint, ruling that a plaintiff may assert a claim for associational discrimination under Title II as long as the plaintiff is directly injured as a result of discrimination against another person with a disability. See ***Barber,* 2006 WL 213970 (D. Colo. Jan. 4, 2006).**

3. Can Third Party Recover Under Association Discrimination Claim for Denial of Access for Person with Disability?

In ***Popovich v. Cuyahoga County Court of Common Pleas,* 150 Fed. Appx. 424 (6th Cir. 2005),** the court affirmed the dismissal of a claim alleging violations of Title II and Section 504, holding that the individual lacked standing to bring an associational discrimination claim because she was not the individual denied access. The court ruled that it is the claimant who must have suffered the denial of access because of her relationship with the individual with a disability, and cannot bring a claim based on denial of access of the person with whom she associates.

In ***Autism Society of Michigan (ASM) v. Fuller,* 2006 WL 1519966 (W.D. Mich. May 26, 2006)**, ASM brought suit under Title II alleging that its organization had suffered an injury because it had to expend resources to address the public school's discrimination against a student with autism. The court dismissed ASM's complaint, holding that in order for organizations to have a claim under Title II, they must allege that they were themselves discriminated against or singled out in a discriminatory way due to their association with individuals with disabilities. Because ASM had not suffered an "ADA injury," its claim of associational discrimination failed.

N. Accommodations For Post-Secondary Students

1. Background

Many students with learning disabilities and other disabilities need accommodations when taking tests. However, courts have generally been hostile to claims made by students who have succeeded in the past despite having a learning disability that may or may not have been diagnosed. Because of the general hostility by courts to these kinds of claims, plaintiffs should try to identify a major life activity other than learning in which they are substantially limited.

2. Case Examples

In ***Wong v. University of California,* 410 F.3d 1052 (9th Cir. 2005),** the court ruled that a medical student with a learning disability impairment was not entitled to the accommodation of an additional reading period because he had a record of prior academic achievements accomplished without accommodation.

In ***Brown v. University of Cincinnati,* 2005 WL 1324885 (S.D. Ohio June 3, 2005),** the court ruled that a student is not substantially limited in his ability to learn since he successfully completed high school and college without accommodations. Test results indicating below average neuropsychological function did not establish substantial limitation in the major life activity of learning given his past academic success.

In ***Dixson v. University of Cincinnati,* 2005 WL 2709628 (S.D. Ohio Oct. 21, 2005),** the court found that a graduate student with bipolar disorder, dyslexia, and ADD was rightfully denied testing accommodation the student's history of success undercut her claim that she was substantially limited in the major life activity of learning.

In ***Krolik v. Nat'l Bd. Of Medical Examiners,* 2006 WL 1794759 (D. Ariz. June 27, 2006)**, the court held that a recent medical school graduate was not entitled to a time extension or use of pen and paper for his board exams because he failed to show how his alleged ADHD substantially limited a major life activity. Although plaintiff claimed that his learning and reading abilities were substantially limited, the court held that his history of academic success was "directly inconsistent with a claim that a student is substantially limited in learning." Further, the plaintiff's claim that his disability affected his ability to pass the test, which in turn affected his ability to work, failed because he had a long successful history of working.

O. Standing to Sue Under Title III

1. Background on Standing

Article III of the Constitution of the United States restricts the federal courts to the adjudication of "cases" and "controversies." Therefore, to proceed with a federal court case, a plaintiff must have "standing" or a sufficient personal stake in a dispute to ensure the existence of a live case or controversy, which renders judicial resolution appropriate.

To establish Article III standing, a plaintiff must show that:

a. **She has suffered an "injury in fact" that is**
    (1) Concrete and particularized and
    (2) Actual or imminent, not conjectural or hypothetical;
b. **The injury is fairly traceable to the challenged action of the defendant; and**
c. **It is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested**

Since no damages are available under Title III of the ADA, it is sometimes challenging for a plaintiff to demonstrate that the relief requested (injunctive relief) will be able to redress the injury (denial of access to a public accommodation) if it is unclear that the plaintiff will return to the facility in the future.

2. Cases in Which Plaintiff Found to Lack Standing

In ***Access for America, Inc. v. Associated Out-Door Clubs,*** **2006 WL 1746890 (11th Cir. June 27, 2006),** the 11th Circuit upheld a district court's finding that the claimants lacked standing to bring a claim against a track facility for having architectural barriers. The court noted that the claimant could not demonstrate that there was any reasonable chance that he would revisit the track, and he failed to prove a threat of future injury.

In ***Wilson v. Costco Wholesale Corp.,*** **426 F.Supp.2d 1115 (S.D. Cal. 2006),** the court held that a store customer who complained of architectural barriers in Costco's store lacked standing under Title III because the customer failed to set forth evidence that he intended to return to the store. The court considered such factors as the vast distance between the customer's residence and the facility, the lack of past patronage at the store, the litigation history of the customer, and the customer's failure to reply to the store's letter requesting specific information about the barriers he encountered at the store.

3. Cases in Which Plaintiff Found to Have Standing

In ***Wilson v. Pier 1 Imports, Inc.,*** **413 F.Supp.2d 1130 (E.D. Cal. 2006),** the court held that a customer who encountered architectural barriers at a store had standing to bring suit under the ADA, even as to architectural barriers that the customer had not encountered himself and of which he was not aware until his expert visited the store. The court held that plaintiffs are not required to actually encounter a barrier in order to sue for its removal under the ADA. The future threat of encountering physical barriers at the store, whether or not initially encountered, sufficed to establish the customer's standing.

In ***Access 4 All, Inc. v. 539 Absecon Blvd., L.L.C.,*** **2006 WL 1804578 (D. N.J. June 26, 2006),** the court granted a hotel patron leave to amend his complaint, stating that if the patron included evidence that he intended to return to the New Jersey hotel, he could establish standing to sue the hotel for failure to provide accessibility under Title III. The court disagreed with the hotel that the claimant's distance from the hotel made it unlikely that he would return if it became accessible. Instead, the court held that due to the nature of hotels, distance is not a good measure of intent to return.

4. Standing When Plaintiff has Filed Multiple ADA Suits

Recently, defendants have begun raising a plaintiff's history of ADA litigation as a way to argue that they do not have standing to bring suit under Title III.

In ***D'Lil v. Best Western Encina Lodge & Suites,*** **415 F.Supp.2d 1048 (C.D. Cal. 2006),** an individual with a disability filed a claim with the district court to recover attorney's fees resulting from a dispute with a hotel over its accessibility. Before the district court would hear her claim, however, it required that she establish standing under Title III. The individual initially had to show that at the time she filed suit she intended to use the hotel in the future, and the failure to correct the alleged violations would result in her injury. In her attempt to meet this requirement, the individual asserted that she would stay in the hotel during future trips if it were made accessible. However, the court found that the individual had a history of bringing similar lawsuits in which she claimed she would return to hotels, but did not. Moreover, she had no concrete plans to return to the hotel. The court ruled that the individual likely did not intend to return to the hotel and, consequently, the court refused to hear her claim for attorney's fees.

In ***Wilson v. Pier 1 Imports (US), Inc.*****, 411 F.Supp.2d 1196 (E.D. Cal. 2006),** a person who had severe degenerative joint disease filed suit when he was unable to gain entry to Pier 1. The defendant attempted to dismiss the complaint by asking the Court to declare the patron a vexatious litigant (i.e. someone who has an abusive and lengthy history of frivolous litigation). While the store pointed to a large number of prior cases brought by the plaintiff, the plaintiff presented evidence that his claims were not frivolous, and that, in fact, he dismissed the accessibility claims when the barriers were removed. A history of frequent litigation does not automatically mean that a patron is vexatious or that such claims are brought in bad faith. The Court found that since his past claims had legal merit and he encountered barriers when he visited Pier 1 Imports, he was allowed to proceed with his claim.

In ***Feezor v. Chico Lodging LLC,*** **422 F.Supp.2d 1179 (E.D. Cal. 2006),** plaintiff, an individual who uses a wheelchair, brought a claim under Title III alleging that he encountered physical barriers that interfered with his ability to use and enjoy the hotel's facilities. The hotel argued that plaintiff did not have standing to bring the claim because he did not allege an intent to visit the hotel in the future, and his of filing of 44 ADA cases in the area demonstrated that he did not have true intent to return to the hotel. The court held that plaintiff did demonstrate the intent to return to the hotel, but was deterred from visiting it again until the alleged barriers were removed. The court further held that plaintiff's litigation history did not evidence bad faith, where plaintiff was "fulfilling the Congressional purpose when it provided for private enforcement of the ADA."

P. Transit Litigation

1. Failure to Make Auditory Announcements

In ***Stewart v. New York City Transit Authority*****, 2006 WL 270100 (S.D.N.Y. Feb. 6, 2006),** plaintiff with a visual impairment sued the New York City Transit Authority for failing to make auditory announcements of bus stops. The Transit Authority sought to

dismiss the case, but the court said the plaintiff could pursue his claim after finding that only approximately 50% of bus drivers were meeting ADA standards for bus stop announcements. The Transit Authority brought evidence that they had a training policy that addressed this concern. Because there was additional evidence that the policy was not being implemented, the court held that in order to be compliant with the ADA, a transit authority must have an "adhered to" policy that trains employees to assist individuals with disabilities. If the skills acquired in the training are not implemented, the transit authority may be liable for noncompliance with the ADA. While the Court held that the individual was not entitled to monetary damages because he did not show that the Transit Authority's failure to comply with Title II was motivated by discriminatory animus or ill will, the Court allowed him move forward with his claim for injunctive relief.

2. Paratransit

In ***Everybody Counts Inc. v. Northern Ind. Regional Planning Commission,*** **2006 WL 287167 (N.D. Ind. Feb. 3, 2006),** plaintiffs claimed that the transportation provider violated the ADA by not providing transportation service to people with disabilities on a comparable level as it does for people without disabilities. After considering the evidence presented by the plaintiffs and the transit provider, the court held that there were still questions on important issues and could not allow the plaintiffs to win without a trial. The court found that since the plaintiffs relied upon anecdotal evidence, it could not determine whether the transit provider did or did not violate the ADA.