Legal Update:
Review and Analysis of Key Concepts under the ADA

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A. Litigation and Potential Litigation Under the ADA Amendments Act

1. Background

Congress passed the ADA Amendments Act ("ADAAA") in September 2008 to correct what it perceived as overly narrow interpretations of the definition of disability by the U.S. Supreme Court and lower courts. One purpose of the ADAAA was to convey that the inquiry into whether a person's impairment is an ADA disability should not demand the extensive analysis that had been done by the Supreme Court and many lower courts. Rather, the focus should be on whether entities covered by the ADA have complied with their obligations. And while Congress did not alter the language of the definition of disability when it passed the ADAAA, it clearly stated that the definition of disability "shall be construed in favor of broad coverage" … "to the maximum extent permitted by the terms of this Act." (ADA Amendments Act Section 4(a))

Thus far, there have not been many cases interpreting the new ADAAA. However, there has been some litigation on retroactivity and there are also some issues that will likely result in future litigation.

2. Does the ADA Amendments Act Apply Retroactively?

When Congress passed the ADAAA, it stated that the effective date of the law would be January 1, 2009. Clearly, any alleged discrimination occurring on or after January 1, 2009 would fall under the provisions of the ADAAA. But what about cases involving alleged discriminatory conduct prior to the ADAAA's effective date? Will the ADAAA be applied in those cases?

The Supreme Court has held that generally statutes are not applied retroactively. The reasoning is that it is unfair to hold a defendant liable for a standard that is articulated after the alleged violation occurred. All courts that have looked at this issue so far have held that the ADAAA, as a general matter, does not apply retroactively. ***See Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562 (6th Cir. 2009); *Lytes v. D.C. Water and Sewer Authority*, 572 F.3d 936 (D.C. Cir. 2009); *Fredricksen v. United Parcel Service, Co.*, 581 F.3d 516 (7th Cir. 2009);** and ***EEOC v. Agro Distribution*, 555 F.3d 462 (5th Cir. 2009).**

However, a court has applied the ADAAA retroactively when the plaintiff was only seeking prospective injunctive relief, as opposed to monetary damages. In ***Jenkins v. National Board of Medical Examiners*, 2009 WL 331638 (6th Cir. Feb. 11, 2009),** the

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plaintiff had a reading disorder and was seeking an accommodation of additional time on a medical licensing examination. Relying on previous Supreme Court precedent taking a narrow view of the definition of disability, the trial court found that the plaintiff did not have an ADA disability. On an appeal taken after the ADAAA was enacted, the Sixth Circuit reversed and held that the ADAAA should be applied to the case relying on Supreme Court precedent that allows statutes to be applied retroactively when the only remedy is prospective injunctive relief. To support its position, the court reasoned that rather than seeking damages for some past act of discrimination, the plaintiff was seeking the right to receive an accommodation on a test that will occur in the future, well after the ADAAA's effective date. The Sixth Circuit also allowed for the recovery of attorneys' fees. Relying on Supreme Court precedent that recovery of attorneys' fees is collateral to the main cause of action, the court found that seeking attorneys' fees did not convert the case into a damages action.

The same result will likely not occur when plaintiffs seek prospective relief in addition to damages for past violations, one court has decided not to apply the ADAAA. In ***Nyrop v. Independent School Dist. No. 11*, 2009 WL 961372 (D. Minn. April 7, 2009)**, the court held that because the focus of the plaintiff's complaints were on the employer's past conduct, retroactive application of the ADAAA is not warranted.

3. Major Life Activities and the Impact of the ADA Amendments Act

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. Prior to the ADA Amendments Act, the ADA did not contain a list of major life activities, although the ADA regulations did contain a non-exclusive list. Over the years, courts have issued a number of decisions on what constitutes a major life activity under the ADA. However, because there was no list of major life activities in the text of the ADA, courts were frequently split over whether a particular activity constituted a major life activity.

b. Impact of the ADA Amendments Act

When it passed the ADA Amendments Act, Congress decided to explicitly list examples of major life activities in the text of the ADA. For its list of major life activities, Congress included major life activities previously identified by the EEOC in its regulations, publications and court filings. These major life activities are: caring for oneself, performing manual tasks, walking and standing, seeing, hearing, eating, sleeping, learning, thinking and concentrating, lifting, speaking, breathing, and working. Congress also added three major life activities that had not previously been identified by the EEOC - bending, communicating and reading.

Moreover, in addition to an explicit list of major life activities, Congress explained that the term major life activity also includes the operation of the following major bodily functions: immune system, neurological, normal cell growth, brain, digestive, respiratory, bowel, circulatory, bladder, endocrine and reproductive functions. It is anticipated that this addition of major bodily functions to the text of the ADA will make it much easier for certain impairments to be deemed a disability by the courts.

c. <u>Major Life Activities and Major Bodily Functions Not Listed in the ADAAA</u>

Although Congress made clear that its list of major life activities and major bodily functions is not an exclusive list, it is anticipated that litigation over what is a major life activity will focus on those activities that are not explicitly listed in the text of the ADAAA.

i. Additional Major Life Activities Identified by the EEOC

Recently, the EEOC issued its Notice of Proposed Rulemaking (NPRM) to revise its ADA regulations and accompanying interpretive guidance in order to implement the ADAAA. In addition to the major life activities listed in the text of the ADAAA, the EEOC's NPRM identifies three additional major life activities: interacting with others, reaching and sitting. Although Congress made clear that the list of major life activities in the ADAAA is illustrative and not exclusive, and gave the EEOC express authority to interpret the definition of disability, there will likely be litigation over the deference given to the EEOC's interpretation and whether these three activities are deemed major life activities under the ADA. For instance, prior to the ADAAA, the lower courts differed over whether interacting with others is a major life activity under the ADA. *See McAlindon v. County of San Diego,* 192 F.3d 1226 (9th Cir. 1999)("because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity); and *Soileau v. Guilford of Maine, Inc.* 105 F.3d 12 (1st Cir. 1997)(finding that interacting with others is different than major life activities like breathing and walking).

ii. Additional Major Bodily Functions Identified by the EEOC

As noted above, Congress stated that major life activities include major bodily functions. Congress provided a non-exclusive list of examples of major bodily functions. In the NPRM, the EEOC identified the following additional major bodily functions: special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal. Again, although Congress made clear that the list of major bodily functions in the ADAAA is illustrative and not exclusive, and gave the EEOC express authority to interpret the definition of disability, there will likely be litigation over the deference given to the EEOC's interpretation and whether these additional major bodily functions are deemed major life activities under the ADA. For instance, a significant number of ADA claims involve people with back impairments. Plaintiffs will likely allege that their back impairments are covered under the ADA because they have a substantial limitation in the major bodily function of the musculoskeletal system.

iii. Major Life Activities and Major Bodily Functions Not Identified by the EEOC

Although Congress and the EEOC have made clear that their lists of major life activities and major bodily functions are not exclusive, there will also likely be litigation over whether major life activities and major bodily functions not identified in the text of the ADAAA nor in the EEOC's regulations are covered under the ADA. For instance, prior to the ADAAA's passage, there was litigation regarding whether sexual relations is a major life activity under the ADA. Since neither Congress nor the EEOC listed sexual relations as a major life activity, litigation over this issue will likely continue.

4. Substantially Limits under the ADAAA

As noted above, one purpose of the ADA Amendments Act was to convey that whether a person's impairment is an ADA disability should not demand the extensive analysis that had been done previously by the Supreme Court and many lower courts. Thus, courts should be using a less stringent standard when determining whether an impairment is substantially limiting, which will likely result in more people with disabilities being able to proceed with their ADA cases.

Also, it should be noted that in the ADAAA, Congress instructed the EEOC to revise its current ADA regulations to no longer define "substantially limits" in the definition of disability as "significantly restricts." Congress found that the EEOC's definition was too high to effectuate Congress' underlying purpose to address discrimination against people with disabilities. Accordingly, in its NPRM, the EEOC states that "an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a major life activity." The language in the text of the ADAAA and the EEOC's regulations should provided useful guidance to courts on how it should interpret the term substantially limits going forward, but it is still anticipated that there will be litigation over this issue.

5. ADAAA Will Likely Shift Litigation Focus to Issues Other Than the Definition of Disability

When Congress passed the ADAAA, it made clear that courts had spent too much time analyzing the definition of disability and that the focus of the courts' inquiry should be on whether covered entities have met their obligations under the ADA. Accordingly, it is expected that there will be less litigation over whether a plaintiff has an ADA disability and instead more litigation on other ADA issues. For instance, there has been relatively little litigation on the term "undue hardship." In many pre-ADAAA cases, the courts would not need to reach that issue because it was found that the plaintiff did not have an ADA disability. If the plaintiff did not have an ADA disability, it was irrelevant whether a requested accommodation was an undue hardship. Now that more plaintiffs will be able to prove they have an ADA disability, litigation will likely now be focusing on other ADA terms, such as undue hardship.

B. Essential Functions/Qualified

1. Background

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.

2. Cases Addressing Whether Specific Activities Are Essential Functions
Many cases are being decided based on whether a particular function is deemed essential:

a. Lifting
In ***Calvo v. Walgreens Corporation*, 2009 WL 2435700 (11th Cir. Aug. 11, 2009)**, plaintiff worked as an assistant manager at Walgreens. Plaintiff sought to return from medical leave, but was restricted from lifting, carrying, pushing or pulling anything over five pounds. Walgreens told the plaintiff that she could not return to work with such limitations. Walgreens argued that lifting, carrying, and pushing more than five pounds at a time was an essential function of an assistant manager at Walgreens by pointing to its job description saying that assistant managers receive, stock, and price merchandise, as well as maintain stock files and reports. Walgreens also cited its local manager's testimony stating that carrying items was a regular part of the assistant manager's job and plaintiff's own testimony saying that her position included "things like cleaning the restrooms and mopping the floors, unloading trucks." The Eleventh Circuit, however, found that plaintiff established a genuine issue of material fact that lifting, carrying and pushing more than five pounds was not an essential job function. Plaintiff's job description contained a list of 23 functions, only one of which clearly involves moving items heavier than five pounds. Moreover, the local manager also stated that after returning from an earlier leave, plaintiff "couldn't really carry anything that you needed to use two arms with, but she was working fine." The manager also commented that other employees would plaintiff her carry items, and no one ever complained about it. The court concluded that the manager would not have opined that plaintiff was working "fine" for four years if lifting and carrying, which plaintiff could not do, was an essential function of her job.

In ***Crook v. Dep't of Veterans Affairs*, 2008 WL 1781090 (E.D. Ark. April 16, 2008)**, the court granted the VA's motion for summary judgment. The plaintiff, who had chronic sinusitis and back and wrist pain, filed a request to have his federal education loan cancelled due to his indefinite inability to work. Four years later he applied for a housekeeping position with the VA. The plaintiff signed the application indicating that he had no impairments that would interfere with requirements of the job, which included heavy lifting and other manual tasks. After being hired, the plaintiff said he could not perform heavy lifting, and the VA discharged him for providing inaccurate information on his application. The plaintiff sued, alleging disability, age, and race discrimination. The court found that heavy lifting was an essential job function, so the plaintiff was not a qualified individual under the ADA.

b. Patient "Take-Down"/ Training
In ***Hennagir v. Utah Department of Corrections*, 2009 WL 2883037 (10th Cir. Sept. 10, 2009)**, a physician's assistant for the Utah Department of Corrections objected to a mandatory physical safety training for all employees coming into direct contact with inmates. Unable to complete the training due to her physical impairments, the employee requested that she be permitted to continue in her position without fulfilling the new requirement. The employer refused, offering either to transfer the employee to a different facility or provide an alternative medical position. The employee declined and was

subsequently terminated. She filed suit under the ADA and the trial court entered summary judgment for the employer. The Tenth Circuit affirmed the ruling for the employer finding that completion of physical safety training was an "essential" job function. While the employee offered three potential accommodations, each proposal involved waiving the training requirement. The Court held that an employer is not required to accommodate employees by waiving essential functions.

In ***Johnston v. Morton Plant Mease Healthcare, Inc*., 2008 WL 191026 (M.D. Fla. Jan. 22, 2008),** the court asked whether participating in "patient take-down" procedures is essential to the job of a clinical nurse working in a pediatric psychiatric unit. Although some employees testified that participation in a "take-down" procedure is essential, plaintiff testified that she worked in the position for over four years without utilizing this procedure. This conflicting testimony led the court to reject defendant's motion for summary judgment finding a genuine issue of material fact.

c. Shift Rotation

In ***Gorney v. Siemens Medical Solutions USA, Inc*., 2009 WL 1543660 (S.D. Ind. June 2, 2009)**, plaintiff, an engineer, was required to work a typical 8:30 a.m. to 5:00 p.m. workday as well as be part of an on-call rotation along with the other engineers to respond to after-hours and weekend calls. The employee was also required to travel occasionally for training. When returning from FMLA leave, the employee requested, as a reasonable accommodation, elimination of after-hours work and overnight travel for a period of six months. The employer denied the request on the basis that it considered this after-hours work and travel to be essential job functions. The employer explained that engineers must be on call because medical equipment may malfunction at any hour. The employee filed suit and the court found that the employee was not qualified to do his job. The employee contended that his doctor's note was a suggestion rather than a restriction. The court rejected plaintiff's argument. It found that no reasonable jury could question employee's determination that he could not return to work without the restrictions set forth by his doctor and therefore was unable to perform the essential functions of his job.

In ***Turner v. Hershey Chocolate USA*, 440 F.3d 604 (3rd Cir. 2006)**, an employer asked its employees working as "table inspectors" to rotate shifts between different positions on an assembly line. One of the three positions that plaintiff was asked to rotate between required standing and repeated bending and twisting. The other two positions could be done while sitting. Plaintiff was unable to perform the standing position due to injuries including fused cervical discs, postlaminectomy pain syndrome, cervical radioculopathy, and thoracic outlet syndrome. Due to her employer's refusal to allow her to perform only the sitting positions, plaintiff was forced to go on long-term disability. Plaintiff filed suit against her employer, alleging discrimination under the ADA. The issue of whether plaintiff could "perform the essential function of the job with reasonable accommodation and that the employer refused to make such an accommodation" turned on whether or not shift rotations between the assembly line positions was an "essential job function." Reversing the district court's grant of summary judgment for the employer, the Third Circuit held that a material issue of fact existed regarding whether the rotation was an essential job function. The court reasoned that implementing or not implementing the

rotation scheme had no effect on the number of required employees, rotating was not a highly specialized function, and plaintiff was not hired for her ability to rotate positions.

d. Attendance

In ***Rios v. Dep't of Education*, 2009 WL 3521083 (2d Cir. Nov. 2, 2009)**, the district court found, and Second Circuit affirmed, that the plaintiff was not qualified for her position because she could not perform the essential function of regularly showing up to work. The Department considered attendance and punctuality to be "essential functions" of the job. This was evidenced by the fact that the Department's rules stated so, and that the Department tried to rectify plaintiff's absences through disciplinary charges and a suspension.

In ***Miller v. University of Pittsburgh Medical Center*, 2009 WL 3471301 (3d Cir. Oct. 29, 2009)**, plaintiff worked as a surgical technologist. During her employment, plaintiff contracted Hepatitis C, requiring three separate leaves of absence for treatment. Upon her return, she was restricted to forty hours each week and eight-hour shifts. During this time, plaintiff had thirteen unscheduled absences for which she received verbal and written warnings. She then received a suspension and was ultimately terminated for violating defendant's absence policy. When she called in sick, plaintiff never indicated that her absence was attributed to Hepatis C, just that she was not feeling well. The district court found that Miller was not qualified because she could not take calls and work shifts as required. The Third Circuit agreed. It explained that given the nature of the plaintiff's job, assisting during surgery performed in the hospital, it was evident that attendance is an essential element of this position.

3. Inconsistent Statements About Ability to Perform Essential Functions

In ***Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999),** the U.S. Supreme Court established the standard for analyzing an ADA case when a plaintiff has made inconsistent statements. In *Cleveland,* the plaintiff had previously obtained Social Security benefits by stating that she was unable to work. When she later sued under the ADA and alleged that she was qualified to do the job, the employer argued that the statement on the Social Security application that she could not work should estop her from also claiming she could work for ADA purposes. The Supreme Court held that these two different claims do not inherently conflict because of the differences between how disability is defined under the ADA and under Social Security. Accordingly, the Court held that when a plaintiff has made apparently inconsistent claims, the plaintiff can still be deemed qualified by providing a sufficient explanation.

In ***Butler v. Village of Round Lake Police Dep't*, 2009 WL 3429100 (7th Cir. Oct. 27, 2009)**, plaintiff, a former police officer, testified before the pension board that his chronic obstructive pulmonary disease (COPD) made it impossible to do his job. He then filed an ADA case claiming that he was qualified to do his job. Plaintiff argued that his statements were not inconsistent because Village officials encouraged him to apply for the pension. The court rejected this argument, noting that there was no evidence that Village officials forced him to do so. Plaintiff also argued that his statements were not inconsistent because they referred to different time periods. The Seventh Circuit noted

that although “the passage of time and a concurrent change in a disability can explain an inconsistency between SSDI and ADA status,” such was not the case here. Plaintiff complained of difficulty breathing from the fall of 2003 on, and by the time he stopped reporting to work at the end of May 2004-nearly a year before the pension board hearing-his COPD affected him such that he could barely walk a few blocks or climb stairs. Thus, the Seventh Circuit affirmed the district court’s holding that plaintiff was judicially estopped from claiming that he was qualified because plaintiff failed to proffer a satisfactory reason for his inconsistency.

In ***Bisker v. GGS Information Services, Inc.*, 2009 WL 2196789 (3d Cir. July 24, 2009)**, an employee with Multiple Sclerosis requested telework as a reasonable accommodation. Her employer suggested that she apply for Social Security disability insurance while it considered her request, and then ultimately denied her accommodation. In her SSDI application, the employee stated that she "became unable to work because of [her] disabling condition on April 18, 2006." Despite this broad statement, the employee explained that she was unable to sit at her desk in the office all day due to muscle spasms and became too woozy to work at times due to her pain medication. In disputing the employee's discrimination allegation, her employer argued that because the employee claimed total disability on her SSDI application, she was not qualified under the ADA. The Third Circuit rejected this argument: it emphasized that SSDI's disability determinations differ from the ADA's, as SSDI does not consider reasonable accommodations. On remand, the district court will consider whether the employee's accommodation request was reasonable.

4. 100% Healed Policies and Qualified to Perform Essential Functions

In ***Street v. Ingalls Memorial Hosp.*, 2008 WL 162761 (N.D. Ill. Jan. 17, 2008),** plaintiff fractured her femur three inches above the knee and her osteoporosis complicated her injury. After surgery, physical therapy, and an arthroscopy, plaintiff sought return to work. The court also found that defendant's 100% healed or "released without restrictions" rule was a *per se* violation of the ADA. Plaintiff presented evidence that the defendant's policy excluded the return of employees who rely on a wheelchair, walker or cane.

In ***Lee v. City of Columbus*, 2009 WL 2591642 (S.D. Ohio Aug. 20, 2009)**, plaintiff worked as a communications technician for the police department. She applied for intermittent leave under the FMLA due to her severe migraines and associated nausea and dizziness. A few years later, plaintiff spoke to her supervisors, telling them that she felt uncomfortable working the main dispatching channels when her migraines occurred and would prefer to be in a less stressful position. She later took short-term disability leave. Defendant told plaintiff that she could not return to her job if she still had restrictions. After her leave, plaintiff requested a position where her phone responsibilities and computer use was limited, as a reasonable accommodation. The City said it could not find such a job. Therefore, plaintiff accepted disability retirement benefits and resigned from her position. In her ADA case, in addition to claiming that she is actually disabled, plaintiff asserts that defendant regarded her as disabled because defendants insisted that she be "100% healed" before being allowed to return to her

communications technician job. The court disagreed. Although 100% healed policies have been held to be unlawful in previous cases, here, defendants told plaintiff that she had to be free of restrictions before she could return to her *specific* job as a communication technician, not to any administrative job available.

C. 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 ***Onken v. McNeilus Truck & Manufacturing, Inc.*, 2009 WL 2069363 (N.D. Iowa Jul. 10, 2009)**, an employee worked as a welder at defendant's plant. Due to his diabetes, the employee periodically suffered from low blood-sugar hypoglycemic episodes. During his episodes, the employee was unable to control his behavior, and often became angry and aggressive. After failed attempts to accommodate the employee and prevent the onset of his episodes, the employer terminated the employee. The employee sued, alleging discrimination under the ADA. The court held for the employer, pointing to the many dangers present in the nature of the employee's work with welding equipment, and the direct threat posed to the safety of the employee's co-workers that existed during employee's hypoglycemic episodes.

In ***Davis v. Michigan Agric. Commodities, Inc.*, 2009 WL 94534 (E.D. Mich. Jan. 12, 2009)**, an employee engaged in dangerous work of cleaning out grain silos, operating heavy equipment and unloading and loading grain from railcars and trucks. The employee developed epilepsy and was unable to control his seizures, despite trying various medications. Ultimately, the employer terminated the employee, who sued under the ADA. The court ruled in favor of the employer finding that the employee's condition involved unpredictable and debilitating seizures, and therefore he was not qualified to perform his duties safely. The court also relied on the fact that there were no other open positions that the employee could safely perform.

In ***Dvorak v. Clean Water Services*, 2009 WL 631247 (9th Cir. Mar. 12, 2009),** an employee took narcotic painkillers for severe neck pain and migraines. The employer was concerned about an inappropriate use of narcotics in the workplace and placed the employee on leave to have a medical evaluation. The evaluator concluded that the employee was dependent on painkillers and would not allow him to return to work in any position as it considered him a threat to safety in the workplace. He sued under the ADA for wrongful termination and failure to accommodation. The trial court found in favor of the employer and the Ninth Circuit reversed finding that genuine issues of fact existed as to whether the employee's medication was a mitigating measure that allowed him to perform his job duties or was a dangerous limitation on his ability to safely work at the

facility. The court further held that an employer must balance its responsibilities to accommodate an employee with a disability under the ADA with its duty to maintain a safe work environment.

In ***EEOC v. Burlington Northern & Santa Fe Railway Co.*, 621 F.Supp.2d 587 (W.D. Tenn. 2009)**, plaintiff worked as a train conductor prior to a motorcycle accident that resulted in the amputation of his right leg below his knee. His employer placed him on medical leave. Eventually, plaintiff's physician released him to return to work with no restrictions. However, the employer, relying on consultation with several doctors, determined that plaintiff posed a direct threat to his own safety and the safety of others, and terminated his employment. The court denied defendant's motion for summary judgment on plaintiff's ADA claim, holding that a genuine issue of fact existed as to whether employer's determination that plaintiff posed a direct threat was objectively reasonable. The doctors relied on by the employer never physically examined or observed plaintiff, but rather referred only to their general knowledge of amputations. A jury could reasonably find that employer's determination was not based on an individualized assessment, required by the ADA.

D. Retaliation

1. Overview

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. Specifically, in Title V, the ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." 42 U.S.C. 12203(A) The rationale behind this anti-retaliation provision is to provide protection for employees who exercise their civil rights and to promote the full and fair enforcement of the ADA.

2. Who Can Bring Retaliation Claims?

In most ADA cases, plaintiffs must prove that they are "qualified individuals with a disability." And thus, plaintiffs must show that they are substantially limited in one or more major life activities or that they are "regarded as" or have a "record of" such an impairment. However, the majority of courts have found that proving disability is not required in retaliation cases because the retaliation section of the ADA refers to "person" instead of "qualified individual with a disability."

In ***Barker v. Riverside Count Office of Education*, 2009 WL 3401986 (9th Cir. Oct. 23, 2009),** a special education teacher, who does not have a disability, claimed she was retaliated against after filing a Complaint with the U.S. Department of Education alleging that the school district was not complying with laws protecting the rights of students with disabilities. After filing suit under the ADA and the Rehabilitation Act, the school district argued that the teacher did not have standing to bring a retaliation claim because she did not have a disability. The Ninth Circuit rejected the school district's argument finding that the anti-retaliation provisions use broad language like "any person

aggrieved" and "any individual" and thus, there is no requirement that a person have a disability to bring a retaliation claim.

3. Was There A Non-Retaliatory Cause for the Adverse Action?
Employers will be able to defeat a retaliation claim if they can demonstrate to the court that there was a non-retaliatory cause for the adverse action against the plaintiff. The following is a case addressing this issue:

In ***Rios v. Dep't of Education*, 2009 WL 3521083 (2d Cir. Nov. 2, 2009)**, the district court found, and Second Circuit affirmed, that the plaintiff was not qualified for her position because she could not perform the essential function of regularly showing up to work. The Department considered attendance and punctuality to be "essential functions" of the job. This was evidenced by the fact that the Department's rules stated so, and that the Department tried to rectify plaintiff's absences through disciplinary charges and a suspension. In response to plaintiff's retaliation claim, the court held that the employer provided a non-retaliatory explanation for its action – namely, plaintiff's absenteeism and tardiness.

4. Was the Employee Engaged in a Protected Activity?
Retaliation claims will only succeed when plaintiffs can demonstrate that they were engaged in protected activities. The following cases explore what are "protected activities" for ADA retaliation cases:

In ***Pfeffer v. Hilton Grand Vacations Co.*, 2009 WL 37519 (D. Hawaii Jan. 7, 2009),** an employee had difficulty walking because of nerve damage in his back. He requested an accommodation and was told he would be discharged if he submitted documentation and made a formal accommodation request, so he withdrew the request. He was later discharged. He filed suit under the ADA, including a claim for retaliation. The court denied summary judgment on the retaliation claim finding evidence that his supervisor threatened his job if he formally requested an accommodation. The court stated that an accommodation request is a protected activity under the ADA and the timing of his discharge close enough to his accommodation request to create an inference of retaliation.

In ***Casna v. City of Loves Park*, 574 F.3d 420 (7th Cir. 2009)**, the Seventh Circuit found that a hard of hearing employee's retaliation suit should proceed to trial. In this case, the employee's supervisor complained that she failed to complete paperwork by its due date. The employee explained that she had not heard the due date, prompting the supervisor to ask how she could work if she could not hear. The assistant informally complained about this comment, by asking: "Aren't you being discriminatory?" Three days later, the City terminated the employee. The Seventh Circuit found this statement to constitute a statutorily protected activity that would allow the retaliation claim to proceed.

In ***Isler v. Keystone School District*, 2009 WL 1497299 (3d Cir. May 29, 2009)**, the Third Circuit held that a bus driver failed to establish a retaliation claim under the ADA because his conversations with school district officials did not amount to a protected

activity. The plaintiff approached school district officials about altering his route in order to accommodate a student with a disability whose long ride adversely affected his health and mood. Five months later the district decided not to renew the plaintiff's contract. Though the plaintiff described his two conversations with the district officials as "advocacy" on behalf of the student, the discussions did not in fact amount to protected activity. The court found that commenting on the behavior of students riding his bus was a part of the plaintiff's employment duties and he was not protesting his employer's discriminatory practices, which was required in order for his actions to be protected.

5. Was There a Causal Connection Between the Employee's Exercise of Protected Activity and the Employer's Adverse Action?

In order to prove a retaliation claim, plaintiffs must demonstrate a causal connection between their exercise of a protected activity (e.g. filing an EEOC claim) and the employer's adverse action (e.g. termination). In many of these cases, the court will look at the "temporal proximity" of the two events to determine if there was a causal connection:

In ***Freeman v. Department of Homeland Security*, 604 F.Supp.2d 726 (D.C.N.J. 2009)**, defendant terminated plaintiff's employment after she sought EEO counseling and filed an EEO complaint. The Department contended that there was no causal connection between plaintiff's filing an EEO complaint and her termination because the Department prepared a notice of proposed removal in late August, and plaintiff formally requested an accommodation through the EEO in early September. The court disagreed: it stated that the adverse employment action at issue is plaintiff's actual termination, not the initial steps taken towards that end. The court explained that simply because defendant first contemplated removing plaintiff before she engaged in statutorily protected conduct does not preclude a finding that the ultimate decision to go ahead with the termination was motivated by retaliatory animus. For this reason, the court denied defendant's motion for summary judgment.

In ***Barkeley v. Steelcase*, 2009 WL 722601 (W.D. Mich. March 17, 2009)**, the court granted defendant's motion for summary judgment in a disability retaliation case. Plaintiff claimed that he was discriminated against when his employer failed to promote him after he filed a complaint with the EEOC. The court granted summary judgment for the defendant because it did not find a causal connection between plaintiff's protected activity and adverse action. The court noted that even assuming that a six-month time between these two activities could be considered temporally proximate, that alone will not support an inference of discrimination when there is no other compelling evidence, as in this case.

E. Reasonable Accommodation Issues

1. Interactive Process

Generally, once a reasonable accommodation has been requested, the employer should engage in an interactive process with the person with the disability.

In ***McBride v. BIC Consumer Products Mfg. Co.*, 583 F.3d 92 (2nd Cir. 2009**), plaintiff went on medical leave due to respiratory problems caused by exposure to fumes at defendant's manufacturing facility. Plaintiff's doctor cleared her to return to work, with instructions that plaintiff not be exposed to the fumes. Defendant offered instead to provide plaintiff with a respirator, which plaintiff rejected. As a result, defendant terminated plaintiff, and plaintiff filed suit under the ADA alleging defendant's failure to accommodate. In affirming the district court's grant of summary judgment for the defendant, the Second Circuit noted that defendant's alleged failure to engage in the interactive process was immaterial, because an employer is not liable under the ADA for failure to engage in the interactive process when there is no showing that a reasonable accommodation was possible. Because plaintiff failed to identify an employment position that was suitable based on her restrictions and abilities, defendant's alleged failure to engage in the interactive process was not grounds for liability.

In ***EEOC v. Chevron*, 570 F.3d 606 (5th Cir. 2009)**, the EEOC filed a complaint on behalf of an individual with Chronic Fatigue Syndrome. The EEOC alleged that the individual's former employer failed to provide a reasonable accommodation when the employer denied the individual's request to move to an office closer to her home, and wrongfully discharged her in violation of the ADA. Reversing the district court's grant of summary judgment for the defendant, the Fifth Circuit explained that once the individual requested an accommodation, it was the employer's duty to engage in a good-faith interactive process. The court held that a jury could reasonably find a failure to engage in the interactive process. The employer was not sure whether a vacant position existed at another location, and made no effort to consider the requested accommodation because the plaintiff had not mentioned a specific location.

2. Leave as a Reasonable Accommodation

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

In ***Bernard v. City of Bryant*, 2009 WL 2044461 (E.D. Ark. Jul. 10, 2009)**, plaintiff sued her former employer for a failure to accommodate under the ADA, when plaintiff could not return to work after having back surgery, and was subsequently terminated. The court noted that neither plaintiff nor her physician could provide a time at which plaintiff would be able to return to work. Granting summary judgment for the defendant, the court explained, "While allowing a medical leave of absence might, in some circumstances, be a reasonable accommodation, an employer is not required by the ADA to provide an unlimited absentee policy."

In ***Clinkscales v. Children's Hospital of Philadelphia*, 2009 WL 1259104 (E.D. Pa. May 7, 2009)**, plaintiff requested and took intermittent medical leave ("meaning that she would be able to take leave as the need would arise") due to a stress-induced physical disability. While on leave, plaintiff was informed by her employer that if she did not return to work by a certain date, she would be terminated. Plaintiff was unable to return to work on that date, and filed suit under the ADA after her termination. Defendant argued that because plaintiff requested medical leave for an indefinite period of time, it

could not be considered a request for a reasonable accommodation. The court denied defendant's motion for summary judgment, explaining, "While Defendants are correct that a request to stay home from work indefinitely is not a reasonable accommodation, 'there are situations in which extended leave is allowed under the ADA, such as where the leave will enable an employee to perform the essential functions of the job in the near future.'" While plaintiff did not provide a definite time at which she could return to work, she indicated her desire to return as soon as she was medically able to do so, and plaintiff's request did not constitute a request for indefinite leave.

3. Employer Only Required to Accommodate Known Disabilities

In ***Thompson v. Rice,*** **2008 WL 5511260 (D.C. Cir. Dec. 30, 2008),** an employee, who experienced a subarachnoid hemorrhage, told her employer that she should not be subjected to stress in the workplace or a hostile work environment. She subsequently sued the employer for failing to provide her with the requested accommodations. The court found in favor of the employer because the employee had failed to adequately inform her employer of her disabling condition. The court held that an employer must know that an employee has a disability in order for a violation of employer's duty to accommodation can be established.

In ***Moore v. Wal-Mart Stores East, L.P.*****, 2009 WL 3109823 (M.D. Ga. 2009)**, plaintiff requested and received a leave of absence from her employer after suffering injuries in an automobile accident. Plaintiff alleged her employer violated the ADA by not granting a reasonable accommodation, not allowing her to return to work after her leave of absence, and eventually terminating her. In arguing that plaintiff was terminated for reasons unrelated to her disability, defendant noted that it never commented to plaintiff about her alleged disability, and plaintiff never informed defendant of her disability. The court denied defendant's motion for summary judgment. To show discrimination under the ADA, a plaintiff must show that the defendant had actual or constructive knowledge of the disability. While "vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice," defendant knew of plaintiff's work restrictions and her accident due to information in medical notes and plaintiff's requested leave of absence. It was immaterial that plaintiff never asked for a reasonable accommodation in *writing*. Her oral requests for light duty work and reduced hours further demonstrated her employer's actual knowledge of her disability.

4. Reassignment as a Reasonable Accommodation

In ***Huber v. Wal-Mart Stores, Inc.*****, 486 F.3d 480 (8th Cir. 2007),** the court held that the ADA does not require an employer to automatically assign a disabled employee to a vacant position if the employee is not the most qualified applicant. After sustaining an injury to her arm and hand, the plaintiff could no longer fulfill the essential functions of her order-filler position and sought reassignment to a vacant router position. Wal-Mart declined to provide the reassignment, finding another applicant more qualified. The plaintiff was instead reassigned to a maintenance position, where she earned roughly half of her prior wages. The Eighth Circuit rejected the plaintiff's argument that Wal-Mart was required to automatically assign her to the router position as a reasonable accommodation. Noting that the Tenth Circuit does require employers to reassign

disabled employees to vacant positions for which they are eligible, the court decided to follow the Seventh Circuit, which does not require automatic reassignment as a reasonable accommodation. The court found persuasive the Seventh Circuit's conclusion that a "contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees." The court held that an employer's policy of hiring the most qualified applicant is legitimate and that "an employer is not required to provide a disabled employee with an accommodation that is ideal from the employee's perspective, only an accommodation that is reasonable." **Note: Following this decision, the plaintiff requested that the U.S. Supreme Court review this case. The Supreme Court agreed to hear the case. *Huber v. Wal-Mart Stores, Inc,* 128 S.Ct. 742 (U.S. Dec. 7, 2007) After the Supreme Court agreed to hear the case, the parties reached a settlement and thus, the Supreme Court dismissed the case. *Huber v. Wal-Mart Stores, Inc,* 128 S.Ct. 1116 (U.S. Jan. 14, 2008).**

In ***Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121 (1st Cir. 2009)**, an employee with mental illness experienced declining productivity related to his disability. He requested the accommodation of reassignment to a position that would emphasize his strengths and de-emphasize his disability-related weaknesses. The employer refused his request and then terminated him after 37 years of service when his performance did not improve. He sued under the ADA and state law and a jury awarded him $1.3 million in damages. The First Circuit Court of Appeals affirmed the jury's award. The court held that the employer did not have a valid excuse for denying him reassignment to a job he was qualified to perform as it would not violate a collective bargaining agreement nor displace an existing worker.

In ***Woodruff v. Seminole County School Board,* 2008 WL 5265810 (11th Cir. Dec. 19, 2008),** a teacher's assistant had bone ailments and knee and back problems that made it difficult for her to stand or walk for long periods of time. Her doctors recommended that she be reassigned to a desk job. She identified a secretary job that was a higher paying position. The board hired someone else for this position. She sued under the ADA. The court held that the district's failure to place her in the secretary job was not discrimination since it would have essentially been a promotion and the reasonable accommodation of reassignment does not require employers to promote employees with disabilities as a way to accommodate them.

In ***McBride v. BIC Consumer Products Mfg. Co.*, 583 F.3d 92 (2nd Cir. 2009**), plaintiff went on medical leave due to respiratory problems caused by exposure to fumes at defendant's manufacturing facility. Plaintiff's doctor cleared her to return to work, with instructions that plaintiff not be exposed to the fumes. Defendant offered instead to provide plaintiff with a respirator, which plaintiff rejected. As a result, defendant terminated plaintiff, and plaintiff filed suit under the ADA, alleging defendant's failure to accommodate. Because the court held that plaintiff failed to identify any accommodation that would allow her to perform the essential functions of her *former* position, her case necessarily rested on the availability of reassignment as an accommodation. However,

plaintiff failed to identify a suitable position. It is insufficient for a plaintiff to merely state that her employer could have reassigned her. She must demonstrate that a vacant position existed for which she was qualified, and plaintiff was unable to do so.

F. 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 provide 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 f iled 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 of *Olmstead* Decision

In ***Disability Advocates, Inc. v. Paterso*n, 2009 WL 2872833 (E.D.N.Y. Sept. 8, 2009)**, suit was brought against the State of New York on behalf of residents with mental illness living in large private state-funded facilities. The suit sought to require New York to provide more community living opportunities under the integration mandate of Title II and the Supreme Court's *Olmstead* decision. After a trial, the court ruled that New York violated the ADA and Rehabilitation Act by segregating 4,3000 people with mental illnesses. The court found this to be so, despite the fact that the facilities were located in

residential neighborhoods and allowed residents to come and go with some restrictions. Instead, the court explained that the facilities were designed to manage and control large numbers of residents, and thus established inflexible routines and limited personal autonomy, housed more than 100 persons, all of whom had disabilities, and did not enable residents to interact with non-disabled persons to the fullest extent possible. The court further noted that a plan to integrate individuals with disabilities into community-based supported housing must, at a bare minimum, specify four things to comply with the integration mandate of ADA and Rehabilitation Act: (1) the time frame or target date for placement in a more integrated setting; (2) the approximate number of patients to be placed each time period; (3) the eligibility for placement; and (4) 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.

In ***Crabtree v. Goetz*, 2008 WL 5330506 (M.D. Tenn. Dec. 19, 2008),** 22 adults with disabilities who were receiving substantial or full-time nursing care sued the State of Tennessee for significantly cutting funding for home health care services. They sued under Title II of the ADA and Section 504 of the Rehabilitation Act, as it would mean that they would be forced out of their homes and into institutions. The court granted a preliminary injunction to the group members to prevent the State from instituting the cuts until: a) a community-based, person-centered system was implemented; b) individualized assessments of the group members were conducted to determine their specific needs; and c) determinations were made whether nursing homes could provide the services the group members needed. The court further determined that the planned funding cuts would violate the requirement under the ADA's regulations that people with disabilities be allowed to live in the most integrated setting appropriate to their needs. The court held that the State had not shown that maintaining home-based services for the plaintiffs would threaten services for other citizens with disabilities, nor had the State developed the comprehensive effectively working plan discussed in the Supreme Court's *Olmstead* decision.

In ***V.L. v. Wagner*, 2009 WL 3486708 (N.D. Cal. Oct. 23, 2009)**, plaintiffs are disabled and elderly Californians who need in-home assistance with one or more of the activities of daily living, such as eating, bathing, toileting or taking medication, in order to live safely at home without risk of serious injury or harm. Plaintiffs sought to prevent California from applying a change in the law to reduce or terminate services from the state In-Home Supportive Services (IHSS) program. The State was planning to change the program's eligibility criteria to reduce or terminate services to recipients. The court granted plaintiff's requested preliminary injunction. It found the plaintiffs will likely be successful on the merits because they submitted substantial evidence from experts, county officials, caregivers and individual recipients showing that class members face a severe risk of institutionalization as a result of losing the services. Specifically, individuals with mental disabilities who lose assistance to remind them to take medication, attend medical appointments and perform tasks essential to their continued health are at a severely increased risk for institutionalization. Further, elderly and disabled individuals with unmet in-home care needs will likely suffer falls, which will lead to hospitalization and subsequent institutionalization. Elderly individuals who lose

meal preparation services will decline in health and risk being placed in a nursing home. Defendants argued that some plaintiffs are not at risk of institutionalization because they have family members who could take over the care once provided by IHSS and others might find care through some other community-based service. The court rejected this argument stating that defendants bear the ultimate responsibility for ensuring the State's compliance with federal disability law. In addition, the record demonstrated that alternative services were not available for a large portion of the class members who faced the risk of institutionalization.

G. Statute of Limitations in Title II Claims

1. Background

Because Title II of the ADA does not provide an express statute of limitations, courts analyzing these cases apply the statutory period for the most analogous state law claim, often a personal injury claim. However, the "continuing violations doctrine" allows plaintiffs to allege facts that occurred outside of the statutory period, if the facts alleged are part of an ongoing violation that continues into the statutory period. Whether or not the continuing violations doctrine applies often turns on whether or not actions taken by the defendant can be considered related acts that are part of the same ongoing discriminatory policy or procedure, or whether the acts are independent and discrete.

2. Recent Statute of Limitations Cases

In ***Frame v. City of Arlington***, **575 F.3d 432 (5th Cir. 2009)**, individuals who use wheelchairs for mobility sued the City of Arlington for violations of Title II of the ADA, when the City failed to make curbs, sidewalks, and parking lots wheelchair accessible. The City moved to dismiss, arguing that the applicable two-year statute of limitations had passed. Affirming the district court's opinion, the Fifth Circuit ruled in favor of the City. The court held that the statute of limitations began to run when the City completed construction of the alleged violations, not when the plaintiffs encountered the violations. The court reasoned that the statute of limitations should begin to run when a plaintiff has "a complete and present cause of action," focusing on the discriminatory act, not the plaintiff's discovery of an injury. The court further held that the alleged violations were not "continuing violations" of the ADA that would defeat the statute of limitations defense, explaining that the continuing violations doctrine only applies where a plaintiff can show a series of *related* violative acts, at least one of which falls within the limitations period. Because the court felt that the City's alleged violations were unrelated to one another, the continuing violations doctrine did not apply. (Note: 1. Judge Prado issued a strong dissent in which he argues that the plaintiffs did not have a "complete and present cause of action" until they encountered the violations and thereby suffered an injury. 2. Currently, a motion for rehearing is pending before the Fifth Circuit.)

In ***Eames v. Southern University and Agricultural and Mechanical College,*** **2009 WL 3379070 (M.D. La. Oct. 16, 2009),** a plaintiff who used a wheelchair for mobility was unable to attend sporting events at defendant's facility due to architectural barriers, and filed suit under Title II of the ADA. Citing *Frame*, defendants argued that plaintiff's claim began to accrue upon completion or alteration of the facility. The court, holding

that plaintiff's claim was within the applicable statutory period, distinguished *Frame*. Whereas in *Frame* the issue was whether defendant's construction created inaccessible *facilities*, here the issue was whether the *programs* offered in the facility were accessible. As long as plaintiff continued to be denied access to defendant's programs, the ADA violation continued, and the date of completion of the facility's construction was irrelevant.

In ***Californians for Disability Rights, Inc. v. California Department of Transportation*, 2009 WL 2982840 (N.D. Cal. Sept. 14, 2009)**, a class of individuals with mobility and vision impairments filed suit under Title II of the ADA, alleging denial of access to sidewalks and cross-walks. Defendant argued that any claims based on construction of these facilities that occurred outside the statutory period were time-barred. The court, citing the "continuing violations doctrine," held that no alleged violations were barred, including those that occurred outside of the statutory period. Distinguishing *Frame*, the plaintiffs' case here was based on a general, ongoing "systemic policy or practice of discrimination," not mere unrelated acts of discrimination.

H. Standing to Sue Under Titles II and 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 she has suffered an "injury in fact" that is:

- **Concrete and particularized;**
- **Actual or imminent, not conjectural or hypothetical;**
- **An injury that is fairly traceable to the challenged action of the defendant; and**
- **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 ***Kramer v. Midamco*, 2009 WL 2591616 (N.D. Ohio Aug. 20, 2009)**, a plaintiff who used a wheelchair for mobility filed suit alleging ADA violations relating to defendant's facility's parking, entrances, paths of travel, seating, signs, and restrooms. Holding that the plaintiff had no standing for her claims, the court found that she only visited the defendant's facility as a "tester" to determine ADA compliance, and only intended to return to monitor compliance. Plaintiff had no intent to use the facility "in her individual capacity" once the alleged barriers were removed. The court also noted that a general

stated intent to return to the place of injury "some day" was insufficient to demonstrate the injury would be redressed by the requested relief.

In ***Cottrell v. Zagami*, LLC, 2009 WL 1416044 (D.N.J. May 20, 2009)**, the parents of a child with a disability sued defendant due to the misuse of accessible parking spaces at defendant's bar and nightclub. The court dismissed plaintiff's complaint (without prejudice), because plaintiff did not plead any intent to return to defendant's facility. Plaintiff therefore could not demonstrate a threat of future harm, and lacked standing.

3. Cases in Which Plaintiff Found to Have Standing

In ***Castaneda v. Burger King Corp.*, 597 F.Supp.2d 1035, (N.D. Cal. 2009),** a wheelchair user brought a class action under Title III of the ADA against Burger King for accessibility violations at 90 of its leased restaurants. The court found that the lead plaintiff had standing to sue even though he had not been to all of the 90 restaurants at issue. Although he had only been to two of the restaurants and encountered barriers, the restaurants shared common design characteristics and discriminatory practices that made the claims viable.

In ***Benavides v. Laredo Medical Center*, 2009 WL 1755004 (S.D. Tex. June 18, 2009)**, plaintiff, a deaf individual who had visited defendant's hospital on several occasions due to a heart condition and diabetes, sued under Title III of the ADA when defendant failed upon each visit to provide an interpreter or other sufficient means of communication for plaintiff. Holding that plaintiff demonstrated a threat of future injury and therefore had standing to sue, the court reasoned that plaintiff had two conditions that were likely to require future medical attention, defendant's hospital was the closest hospital to plaintiff's home, plaintiff was denied his request for interpretive services during three separate visits, and defendant had no policy in place to accommodate deaf individuals in the future.

In ***Disabled Patriots of America v. Fu*, 2009 WL 1470687 (W.D.N.C. May 26, 2009),** an individual with paraplegia sued an allegedly inaccessible hotel under Title III of the ADA. On defendant's motion to dismiss, the court held that plaintiff had a specific intent to return to defendant's hotel, and therefore demonstrated a threat of future harm and had standing to sue. The court relied on plaintiff's statement that he intended to visit defendant's hotel in the near future. Plaintiff frequently made business trips to North Carolina, the location of defendant's hotel, and plaintiff in fact had a specific future reservation at Defendant's hotel. [See also, Access 4 All, Inc. v. OM Management, LLC, 2007 WL 1455991 (S.D. Ohio May 15, 2007) (plaintiff not required to make reservation at hotel that remained inaccessible as it would be an "exercise in futility.")]