

# Welcome to the 2010 Legal Issues Webinar Series



The content and materials of this training are property of the DBTAC: Great Lakes ADA Center and cannot be distributed without permission. This training is developed under NIDRR grant #H133A060097. For permission to use training content or obtain copies of materials used as part of this program please contact us by email at [cdiaz3@uic.edu](mailto:cdiaz3@uic.edu) or toll free 877-232-1990 (V/TTY).

## Impact of the Supreme Court's ADA Decisions



### Presented by:

Barry Taylor, Legal Advocacy Director &  
Alan Goldstein, Senior Attorney,  
Equip for Equality

Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.

# Overview – Webinar Content



- ADA Amendments Act (ADAAA) explicitly overruled U.S. Supreme Court decisions in the *Sutton* trilogy and *Toyota v. Williams*.
- Many Supreme Court ADA cases are still good law.
- These Supreme Court decisions will be analyzed followed by a selection of lower court decisions applying the Supreme Court's precedent.
- A more thorough analysis is contained in the legal brief with additional cases.



# Overview – Webinar Cases

## Title I

- *U.S. Airways v. Barnett*
- *Raytheon v. Hernandez*
- *Chevron v. Echazabal*
- *Cleveland v. Policy Management Systems, Corp.*
- *Board of Trustees of the University of Alabama v. Garrett*

## Title II

- *Olmstead v. L.C.*
- *Tennessee v. Lane*

## Title III

- *Bragdon v. Abbott*
- *PGA Tour, Inc. v. Martin*

## Impact of the Supreme Court's ADA Decisions



### Title I

*U.S. Airways v. Barnett*

*Raytheon v. Hernandez*

*Chevron v. Echazabal*

*Cleveland v. Policy Management Systems, Corp.*

*Board of Trustees of the University of Alabama v. Garrett*

# *Barnett* – Reassignment and Seniority Policies



## *U.S. Airways v. Barnett*, 535 U.S. 391 (2002)

- **Holding:**
  - ❖ It would be an undue hardship for an employer to violate a consistently enforced seniority policy in order to place an individual in an open position as a reasonable accommodation.
- **Implication:**
  - ❖ Reassignment may be available to a worker despite a seniority policy if the individual can show the seniority provision was not strictly followed in other cases.
  - ❖ Refers to reasonable accommodations as “special” and “preferential.”

# Reassignment & Seniority Policies – *Tobin*

*Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121 (1st Cir. 2009)

- Employee with bipolar disorder requested more support staff and assignment to a “mass marketing” account to increase business.
  - ❖ Jury found for employee and the company appealed.
- **Employer:** Request was unreasonable as mass marketing accounts were awarded as perks to the highest performing agents.
  - ❖ Co. analogized this policy to the neutral seniority system in *Barnett*.
- **Court:** Jury award upheld - *Barnett* exceptions were applicable.
  - ❖ Evidence showed that mass marketing accounts were awarded on a case-by-case discretionary basis, and not solely for sales performance.
  - ❖ Mass marketing accounts were given to new sales representatives or low-producing sales representatives to jumpstart their business.
  - ❖ Managers admitted that they had the discretion to assign a mass marketing account to plaintiff, but chose not to do so.

# Reassignment & Seniority Policies – *Gamez-Morales*

*Gamez-Morales v. Pacific Northwest Renal Services, LLC*,  
304 Fed.Appx. 572 (9<sup>th</sup> Cir. 2008)

- Employee requested transfer to another workstation as a RA.
- Employer denied plaintiff's request as it conflicted with defendant's neutral policy prohibiting transferring positions within six months of a disciplinary action.
- The district court granted summary judgment to defendant, and the Ninth Circuit affirmed relying on *Barnett*.
  - ❖ Requested transfer was not reasonable as it would violate defendant's neutral policy.
  - ❖ Employee failed to produce evidence of special circumstances.



# Reassignment & Seniority Policies – *Dilley*

## *Dilley v. Supervalu, Inc.*, 296 F.3d 958 (10th Cir. 2002)

- A truck driver who had a lifting restriction requested a reassignment to a route that did not require heavy lifting.
- Employer argued reassignment would violate its seniority system as a more senior employee could later bid for the new position.
- The court disagreed, stating that there was only a “potential violation of the seniority system.”
- As the employee had the requisite seniority, and the employer could remove him later if a more senior employee requested the position, reassignment should have been available.

# Remaining Reassignment Issue: Competing for Position

- **EEOC Position:** The employee does not need to be the best qualified individual for the position.
- “Reassignment means that the employee gets the vacant position if s/he is qualified for it.”
- Otherwise, “reassignment would be of little value and would not be implemented as Congress intended.”
- **Split in Circuits:** Some Courts follow the EEOC’s position (10<sup>th</sup> and D.C.) and others do not (7<sup>th</sup> and 8<sup>th</sup>).
- **Query:** Does ADAAA language regarding EEOC Guidance change how reassignment will be examined?  
*EEOC Enforcement Guidance on Reasonable Accommodation...; See also, Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007).*

# Raytheon v. Hernandez

## *Raytheon Co. v. Hernandez*, 540 U.S. 604 (2003)

- **Facts:** Hernandez resigned due to drug use. After rehabilitation, Raytheon refused to rehire him based on a policy of not rehiring people who were terminated for cause.
- **Holding:** Employers applying a non-pretextual, neutral no-rehire policy are generally not liable for ADA “disparate treatment” claims.
  - ❖ If a “disparate impact” claim was timely raised, Raytheon would have had to articulate some “business necessity” for its no-rehire policy.
  - ❖ **Query:** Would raising disparate impact have changed the result?
  - ❖ **Note:** Compare the facts described by Justice Thomas with earlier decision, *Hernandez v. Hughes Missile Systems Co.*, 292 F.3d 1038 (9<sup>th</sup> Cir. 2002).
    - *Raytheon* has been cited for the proposition an employer must know of a disability to be liable for discrimination. See, e.g., *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69 (2<sup>nd</sup> Cir. 2002)

# Hernandez and Business Necessity



## *Bates v. United Parcel Service, Inc.*, 511 F.3d 974 (9<sup>th</sup> Cir. 2007)

- Class of deaf and hard of hearing employees and job applicants could not pass hearing standards
- Department of Transportation (DOT) standards require drivers of trucks in excess of 10,000 pounds to pass a hearing test.
  - ❖ UPS required all drivers to meet the DOT standard (even if smaller trucks).
  - ❖ **UPS:** Requirement is an essential function or part of being a “safe driver.”
- **Court:** Remanded to see if plaintiffs could drive safely.
  - ❖ If so, the question becomes whether the qualification standard used by the employer (passing the DOT test) satisfies the business necessity defense.
  - ❖ *Bates* cited *Raytheon* for the proposition that the business necessity test applies to disparate treatment and disparate impact claims.

See, DBTAC: Great Lakes ADA Center Webinars on Disparate Treatment and Disparate Impact and on Qualified Issues

# *Echazabal* – We’ll protect you by not hiring you



*Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002)

- **Facts:** Person with Hepatitis C was not hired as he was considered a danger to himself.
  - ❖ Liver condition may be exacerbated by exposure to toxins.
  - ❖ ADA statute only listed danger to “others.” 42 USC § 12111(3).
  - ❖ Title I regulations included danger to self. 29 C.F.R. §1630.2(r).
- **Holding:** EEOC Regulations upheld.

**Implication:** May allow paternalistic conjecture by employers.

**Note:** Title III regulations do not include threat to self. 28 § C.F.R. 36.208. See, *Celano v. Marriott International, Inc.*, 2008 WL 239306 (N.D. Cal. 2008) (Threat-to-self defense is not applicable under Title III).

See, DBTAC: Great Lakes ADA Center Webinar on Direct Threat

## *Echazabal* Applied – *Darnell & Uncontrolled Diabetes*

*Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005)

- Summary judgment affirmed for employer who did not rehire employee with insulin-dependent, Type 1 diabetes
- Pre-employment physical - diabetes not under control.
- **Court:** An employee is not qualified if his disability poses a direct threat to his safety or the safety of others.
  - ❖ Uncontrolled diabetes in a manufacturing plant with dangerous machinery could cause serious injury.
  - ❖ Employer relied on sufficient objective medical evidence and an individualized assessment in making its decision.
  - ❖ Applicant admitted failure to adequately control his diabetes.

# *Echazabal Applied – Clayborne and Celano*



## *Clayborne v. Potter*, 448 F.Supp.2d 185 (D.D.C. 2006)

- U.S. Postal Service (USPS) employee sued her employer under the Rehabilitation Act when she was placed on sick leave and had her duties reduced because of her retinis pigmentosa, an eye condition causing significant vision loss.
- **Court:** Employee posed a direct threat to her own safety.
- Relied on *Chevron* and *Darnell* in recognizing the threat-to-self defense, and then explained that the defense applied here, as the employee had been injured at work on three separate occasions as a result of her poor vision.

# *Chevron Applied – Taylor v. Rice*



*Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006)

- Plaintiff's application to be an officer with the Foreign Service was rejected due to HIV status.
  - ❖ State Department policy prohibited hiring of people with HIV for these positions.
  - ❖ Asserted they may need 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 in such a situation.
- D.C. Circuit Court reversed
  - ❖ Reasonable accommodations may reduce the alleged direct threat so there was no substantial risk of significant harm to his health.





# Direct Threat & Accommodations

## *Taylor v. Rice*

- Taylor proposed 2 accommodations:
  - (1) granting him Class 2 clearance and only placing him at overseas posts “where he can access local HIV physicians and diagnostic laboratories,”  
**Query:** Does this require waiving an essential job function?  
or,
  - (2) sending him to any overseas post, but “permit[ting] him to use his allotted leave time to access routine medical care.”
- In February 2008, the State Dept. announced it was lifting its ban on hiring people with HIV in the Foreign Service.



# ADA Supreme Court Case: Qualified Issue – Receipt of SS

*Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999)

- An SS Beneficiary asserted an ADA Claim
- **Holding:** People who are disabled under Social Security rules may pursue ADA claims.
- **Basis of the Decision:**
  - ❖ ADA considers Reasonable Accommodations
  - ❖ Differing Analyses (e.g. SSA has listed disabilities)
  - ❖ SSA work incentive rules anticipate working
  - ❖ People's conditions may change over time
  - ❖ Alternative pleading is allowable

## *Cleveland Language*

- “Pursuit, and receipt of, SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA.”
- “The two claims do not inherently conflict ... There are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.”
- “An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, ‘I am disabled for purposes of the Social Security Act.’”

# Cleveland Language



- “An individual might qualify for SSDI under the SSA’s administrative rules and yet, due to special individual circumstances, remain capable of ‘perform[ing] the essential functions’ of her job.
- To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror’s concluding that, assuming the truth of, or the plaintiff’s good-faith belief in, the earlier statement, the plaintiff could nonetheless ‘perform the essential functions’ of her job, with or without ‘reasonable accommodation.’”
- **Note:** The legal / factual distinction is important.

See this webinar’s legal brief for more *Cleveland* resources

# Cleveland in the Lower Courts



## ***Voeltz v. Arctic Cat, Inc.*, 406 F.3d 1047 (8<sup>th</sup> Cir. 2005)**

- Employee applied for SS benefits at suggestion of HR.
- Stated - could have worked “just fine” if MS accommodated
  - ❖ Dr. suggested modified job duties, modified schedule, & OT consult.
- Jury verdict for employee was upheld on appeal

## ***Krensavage v. Bayer Corp.*, 2008 WL 177802 (3rd Cir. 2008)**

- Plaintiff’s ADA claim is barred as only accommodation requested was extended unpaid leave that would not render her qualified.

## ***Crews v. Dow Chemical Co.*, 287 Fed.Appx. 410 (5th Cir. 2008)**

- Physician’s assessment that employee was indefinitely incapable of returning to work precluded an ADA claim.
  - ❖ Employee was not a “qualified individual.”

# *Cleveland* in the Lower Courts

## *Butler v. ...Round Lake Police Dep't*, 2009 WL 3429100 (7<sup>th</sup> Cir. 2009)

- Former police officer with chronic obstructive pulmonary disease (COPD) told Pension Board he could barely walk a few blocks or climb stairs & was not reinstated.
- **Court:** Plaintiff estopped from claiming he was qualified.
- **Note:** *Cleveland* is applied to benefits other than SS.

## *Solomon v. Vilsack*, 2009 WL 2986608 (D.D.C. Sept. 16, 2009)

- Federal Employees Retirement System (FERS) awards disability benefits only if there are no reasonable accommodations.
- To collect, employee must be “unable, because of disease or injury, to render useful and efficient service.”
- **Court:** FERS benefits precludes a failure-to-accommodate claim.

# ***Cleveland* in the Lower Courts**

***Finan v. Good Earth Tools, Inc.*, 565 F.3d 1076 (8th Cir. 2009)**

- Plaintiff who received LTD and SS benefits may recover under an ADA “regarded as” claim. (Jury: \$410,000 - back pay & \$65,000 - damages.)
  - ❖ Employer said employee had an actual disability and was not “qualified.”
  - ❖ Court disagreed and noted the different definitions of disability under ADA and SS Act.



# Additional Title I Cases – Covered in the Brief

*Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001)

- No money damages for state employees due to the 11th Amendment.

*Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998)

- A Collective Bargaining Agreement requiring arbitration cannot waive statutory rights unless the waiver is “clear and unmistakable.”

*EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)

- EEOC may seek victim-specific relief despite an arbitration agreement.

*Clackamas Gastroenterology Assoc..., v. Wells*, 538 U.S. 440 (2003)

- In determining the # of employees under the ADA, use common law criteria for master-servant relationships.



# Impact of the Supreme Court's ADA Decisions



## Title II

*Olmstead v. L.C.*

*Tennessee v. Lane*

# *Olmstead* and the ADA's Integration Mandate



Photo: Lois Curtis, surviving plaintiff in the *Olmstead* Decision

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

- **Facts:**

- ❖ Two women with mental illness and intellectual disabilities were admitted to state psychiatric hospital.
- ❖ Both were recommended for placement in community based program
- ❖ Despite their desire to move into the community, they remained institutionalized
- ❖ They filed suit alleging the State's failure to provide community services violated the integration mandate under Title II of the ADA



# Unjustified Isolation is Discrimination under ADA

## Supreme Court:

- Unwarranted institutionalization of people with disabilities is a form of discrimination under ADA
- Segregation perpetuates unjustified assumptions that institutionalized persons are incapable or unworthy of participating in community life
- Institutional confinement severely diminishes individuals' everyday life activities, including family relations, social contacts, work, educational advancement and cultural enrichment.

# ***Olmstead*: 3 Requirements for Community Placements**

## **Supreme Court – 3 Requirements:**

- Treatment officials find community placement is appropriate
- Person does not oppose placement in the community
- Placement can be reasonably accommodated taking into account resources of the State and the needs of others with disabilities for services

# ***Olmstead: How Can State Meet Its Obligations Under ADA?***

- State can meet its obligations under ADA/*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.

# *Olmstead* Cases – At Risk of Institutionalization

*Fisher v. Oklahoma Healthcare Auth.*,  
335 F.3d 1175 (10th Cir. 2003)

- State limited prescription drugs for community programs, but not for nursing home residents.
- Plaintiffs claimed ADA violation because medication limits placed them at risk of institutionalization.
- **Court:** Integration mandate's protections not limited to those currently institutionalized, but also those who may “stand imperiled with segregation” because of state policy.

*See also, G. v. Hawaii*, 2009 WL 5061742 (D. Hawaii Dec. 24, 2009); *Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003); *Nelson v. Milwaukee County*, 2006 WL 290510 (E.D. Wis. Feb. 7, 2006)

# Risk of Institutionalization Because of State Budget Cuts

*V.L. v. Wagner*, 2009 WL 3486708 (N.D. Cal. 10/23/09)

- California proposed reducing or terminating in-home support services for elderly and people with disabilities.
- Plaintiffs filed suit to prevent service cuts
- **Argument:** Violation of ADA because cuts would place plaintiffs at risk of institutionalization.
- **Court:** Budget cuts could violate the ADA's integration mandate.
- Preliminary injunction granted which prevents budget cuts from taking place while litigation is pending.

# *Olmstead* Cases – Comprehensive Effectively Working Plan

*Disability Advocates, Inc. v. Paterson*, 2009 WL 2872833 (E.D.N.Y. Sept. 8, 2009)

- Trial held on suit against the State of New York on behalf of residents with mental illness living in large private state-funded facilities.
- **Court:** New York violated the ADA and Rehabilitation Act by segregating 4,300 people with mental illness.
  - ❖ Large institutional setting - more than 100 people per facility
  - ❖ Facilities had inflexible routines that limited personal autonomy
  - ❖ Residents were not able to interact with people without disabilities to the fullest extent possible
  - ❖ Therefore, segregation existed, even though facilities were in residential neighborhoods and allowed residents to come and go, with restrictions.



# *Disability Advocates v. Paterson*

*Disability Advocates, Inc. v. Paterson*, 2009 WL 2872833 (E.D.N.Y. 9/8/09)

- **Court:** 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) Time frame or target date for placement in a more integrated setting
  - 2) Approximate number of patients to be placed in each time period
  - 3) Eligibility for placement; and
  - 4) General description of the collaboration required between the local authorities and the housing, transportation, care and education agencies to effectuate integration into the community.

# Comprehensive Effectively Working Plan & Fundamental Alteration

*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 under Title II and § 504
- Plaintiffs argued that funding cuts would force plaintiffs to move out of their homes and into institutions.
- **State:** There is a comprehensive plan and requested relief would pose a fundamental alteration.
- **Court:** Found for plaintiffs.
  - ❖ No comprehensive effectively working plan under *Olmstead*.
  - ❖ Plan was not operational and lacked a projected date for implementation.
  - ❖ Questioned whether such a plan would be deemed effective given the problems with the State's healthcare structure and past performance.

## ***Crabtree* – Fundamental Alteration**

**Court:** Three factors to consider whether the fundamental alteration defense arises:

- 1) State's ability to continue meeting the needs of other institutionalized mental health patients for whom community placement is not appropriate;
- 2) Whether the State has a waiting list for community placements; and
- 3) Whether the state has developed a comprehensive plan to move eligible patients into community care settings.

# ***Olmstead* Cases – Fundamental Alteration**

***Radaszewski v. Maram*, 2008 WL 2097382  
(N.D. Ill. March 26, 2008)**

- A young man with significant disabilities received skilled nursing care services in his home until age 21 under a Medicaid waiver program.
- Illinois did not provide similar services to people over age 21 at home under a different Medicaid waiver program.
  - ❖ The Home Services Program (HSP) only offered extensive nursing services in a nursing home or institutional setting.
  - ❖ Plaintiff required 16 hours per day of skilled nursing care, the State only offered 5 after he turned 21.

# *Radaszewski* and Fundamental Alteration

- **State:** Serving him in his home was a fundamental alteration of its programs not required under *Olmstead*.
- Previously in this case, the 7th Circuit rejected the State's position.
  - ❖ No fundamental alteration since the State already provided this service, just not at the level requested. The case was remanded.
- After trial, the court found that the plaintiff's case was even stronger based on evidence that it would be less expensive for the State to serve the plaintiff in his home rather than in a nursing home.

See also, *Grooms v. Maram*, 563 F.Supp.2d 840 (N.D. Ill. 2008); *Sidell v. Maram*, 2007 WL 5396285 (C.D. Ill. May 14, 2007).

# Courthouse Access – *Tennessee v. Lane*



- 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.
  - ❖ Beverly Jones worked as a court reporter.
  - ❖ George Lane faced misdemeanor charges.
    - The first court date he crawled up the stairs
    - He did not want to do that the second time.
- **Tennessee:** Immune from Title II suits under the 11<sup>th</sup> Amendment.
- Plaintiffs argued that there should at least be liability for injunctive relief under *Garrett* (Title I case).
  - ❖ Also contended money damages should be available citing a stronger history of discrimination by states under Title II.

# Courthouse Access – *Tennessee v. Lane*

- **Court:** Title II appropriately abrogated state sovereign immunity
  - ❖ Extensive history of discrimination regarding public access
  - ❖ Money damages may be awarded for lack of access to courts.
  - ❖ Also documented the history of state-sponsored discrimination against people with disabilities in many different areas, including voting, education, institutionalization, marriage and family rights, prisoners' rights, access to courts, and zoning restrictions.

**Note:** At Oral Argument, Justice Scalia seemed to say that Lane should have asked someone to carry him up the stairs implying there would be no violation if the State said, “we'll see that you are carried up by... constables.”

**Query:** How does this compare with *Garrett*?

# Tennessee v. Lane: Subsequent Case – Attorney Licensing

*Brewer v. Wisconsin Board of Bar Examiners*,  
270 Fed.Appx. 418 (7th Cir. 2008)

- Plaintiff disclosed receipt of SS benefits on WI Bar application.
- Board required a \$2,000 psychological evaluation (at her expense).
- Plaintiff refused, but offered affidavits from employers and professors attesting to her fitness to practice.
- The Board rejected this alternative and declined to act.
- **Court:** Board was immune from suit under 11<sup>th</sup> Amendment as ADA did not abrogate for claims challenging attorney-licensing practices.
  - ❖ No evidence presented of a history and pattern of discrimination in the administration of attorney-licensing schemes.



# *Tennessee v. Lane:* Subsequent Case – Jury Duty

*United States v. Watson*, 483 F.3d 828 (D.C. Cir. 2007)

- During jury selection in a criminal case, the prosecutor exercised two peremptory challenges to strike jurors who were blind due to his heavy reliance on visual materials.
- **Issue:** Was the prosecutor's use of preemptory challenges lawful.
- **Watson:** Under *Lane*, jury service is a fundamental right, so heightened scrutiny should be used.
- **Court:** Did not apply strict scrutiny and found no violation
  - ❖ Prosecutor's explanation was rational.
  - ❖ Interpreted *Lane* to only include absolute bars to jury service and discretionary bars invoked by trial judges, but not the exercise of peremptory challenges.

# *Tennessee v. Lane:* Subsequent Case – Education

## *Association for Disabled Americans v. Florida International University*, 405 F.3d 954 (11<sup>th</sup> Cir. 2005)

- Students with disabilities filed suit against University for ADA violations including failing to provide physical access, sign language interpreters, effective note takers.
- **Issue:** Can students sue for money damages for a University's ADA violations?
- **Court:** Yes, Lane should be extended to education.

*See also, Constantine v. George Mason Univ.*, 411 F.3d 474 (4<sup>th</sup> Cir. 2005); *but see, Doe v. Univ. of Ill.*, 429 F.Supp.2d 930, (N.D. Ill. 2006); *Johnson v. Southern Connecticut State University*, 2004 WL 2377225 (D. Conn. Sept. 20, 2004) (education not a fundamental right like access to courts).

## Additional Title II Cases – Covered in the Brief



*Penn. Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998)

- Title II of the ADA protects state prison inmates

*Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Resources*, 532 U.S. 598 (2001)

- A Judgment, Consent Decree, or Settlement is required before attorney's fees will be awarded.

*Barnes v. Gorman*, 536 U.S. 181 (2002)

- Punitive damages are not allowed under Title II of the ADA or § 504.

*U.S. v. Georgia*, 546 U.S. 151 (2006)

- 11<sup>th</sup> Amendment is not a bar to suits for money damages when there are violations of the 14<sup>th</sup> Amendment.

## Impact of the Supreme Court's ADA Decisions



### **Title III**

*Bragdon v. Abbott*

*PGA Tour, Inc. v. Martin*

# ***Bragdon v. Abbott* – People with HIV Are Covered**

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

- **Facts:** A dentist refused to treat a patient with HIV.
- **Holding:**
  - ❖ Asymptomatic HIV is a physical impairment under the ADA
  - ❖ Reproduction is a major life activity
  - ❖ Direct threat analysis must be based on “best available medical or other objective evidence,” not speculation, generalizations, or stereotypes.
- **Implication:** The list of major life activities in the ADA Regulations is not exhaustive.

See, DBTAC: Great Lakes ADA Center Webinar on Direct Threat

# ***Bragdon v. Abbott:*** **Subsequent Case – *Fiscus***

***Fiscus v. Wal-Mart Stores, Inc.***, 385 F.3d 378 (3rd Cir. 2004)

- **Court:** An employee's renal disease substantially limited her ability to cleanse her blood and eliminate body waste, which are "major life activities," citing *Bragdon*.
- **Rationale:** Does not matter if an activity is an internal, autonomous activity or an external, volitional activity.
  - ❖ Not required to show activity is a recurrent or daily feature of life.
  - ❖ Issue was not the frequency of the activity, but its importance to the life of the individual.
- These activities are obviously "central to the life process," because in its absence an individual will die.

# *Bragdon v. Abbott:* Subsequent Case – Lee's Log Cabin

*EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438 (7th Cir. 2008)

- EEOC alleged an employer violated the ADA by not hiring an individual because she was HIV positive.
- In response to S/J motion, EEOC mentioned for 1<sup>st</sup> time that individual had AIDS, and provided documentation of limitations.
- **Court:** Under *Bragdon*, HIV is not a *per se* disability.
  - ❖ HIV and AIDS are not synonymous for purposes of the ADA.
  - ❖ Info regarding AIDS was produced too late to be considered.
  - ❖ No record of substantial limitation due to HIV and no disability.
- Court cited individualized analysis required by *Bragdon*.

**Note:** *Bragdon*, *Fiscus*, and *Lee's Log Cabin* were decided before passage of the ADA Amendments Act (ADAAA).

# *PGA v. Martin* – Scope of Public Accommodations



## *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001)

- Golfer sought to use a golf cart in PGA tournaments.
- **Issue:** Does Title III cover golf tournament participation?
- **Holding:** Participating in golf tournaments is a benefit & privilege under Title III - reasonable modifications of policies may be required.
  - ❖ Title III is not limited to customers but even if it were, Casey Martin is a “customer” of the “competition.”
- Definition of public accommodations should be liberally construed
- A golf cart does not fundamentally alter the nature of tournament golf.
- Analysis should be: Is accommodation reasonable, necessary, and not a fundamental alteration.
- **Scalia Dissent:** Title III applies only to customers, not contractors.



# Independent Contractors Under Title III



***PGA v. Martin* has been cited to protect independent contractors**

*Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F. 3d 113 (3<sup>rd</sup> Cir. 1998)

- “A medical doctor with staff privileges... may assert a cause of action under Title III...”

*Haas v. WY Valley Health Care*, 553 F.Supp.2d 390 (MD PA 2008)

- A physician with privileges had standing under Title III and the Rehab although he posed a direct threat and was not “qualified.”

***But See,***

*Wojewski v. Rapid City R'gn'l Hosp.*, 2005 WL 1397000 (D.S.D. 2005)

- Rejected *Menkowitz* in finding that Title III should only apply to “customers” and not to a Dr. who was an independent contractor.
- Cited Scalia’s dissent in *PGA v. Martin* for this position.

***See Great Lakes Webinar on Employer Defenses***

## Lower Courts' Interpretation of *Martin* – Fundamental Alteration Issues

*Kuketz v. Petronelli*, 821 N.E.2d 473 (Mass. Jan 28, 2005)

- Allowing 2 bounces in racquetball is a fundamental alteration.

*Association For Disabled Americans v. Concorde Gaming Corp.*, 158 F.Supp.2d 1353 (S.D. Fla. 2001)

- Allowing people to play craps from a lower setting would be a fundamental alteration.

*Fortyune v. AMC, Inc .*, 364 F.3d 1075 (9<sup>th</sup> Cir. 2004)

- Movie theater policy: People accompanying wheelchair-users could not demand use of companion seating for sold-out shows.
- This policy violated Title III – plaintiff's request to modify the theater's policies to allow him to sit with his companion was reasonable.

*See Great Lakes Webinar on Title III*

# Additional Title III Cases – Covered in the Brief



*Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998)

- A waiver of a statutorily protected right to a judicial forum in favor of arbitration must be “clear and unmistakable.”

*Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005)

- Absent a statement in the text, a statute does not apply to the internal operations of foreign-flagged ships.
- Considerations other than cost may apply as an undue burden.

# Ongoing ADA Issues

- Reassignment – Automatic Placement? (*See Barnett*)
- Coverage of Independent Contractors (*See Martin*)
- Reach of *Lane* beyond courtroom access
- Medical Inquiries & Confidentiality (No Sup. Ct. Cases)
- Is there a direct threat to self defense under Title III?
- EEOC Regulations Under the ADAAA (when released)
  - ❖ Proposed Regulations - Public comment period ended 11/23/09
  - ❖ JAN guidance: <http://www.jan.wvu.edu/bulletins/adaaa1.htm>

# Thank you for Participating In Today's Session



Please join us for the next session in this series:

**April 7, 2010**

**Reasonable Accommodation Legal Update**

[www.ada-audio.org](http://www.ada-audio.org)

877-232-1990 (V/TTY)

# Session Evaluation

Your feedback is important to us. Please fill out the on-line evaluation form at:

<http://www.surveygizmo.com/s/233373/impact-of-the-supreme-under-the-ada-feb-3-2010>



# Impact of the Supreme Court's ADA Decisions

## THE END

### **Presented by:**

Barry Taylor, Legal Advocacy Director

and

Alan Goldstein, Senior Attorney,

Equip for Equality

Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.