ADA Audio Conference Series
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What are the courts up to?
Review and Analysis of Recent Litigation Under the ADA
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A. 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))

2. Cases Interpreting "Disability" Under the ADA Amendments Act

Thus far, the cases interpreting the ADAAA have followed Congress' direction to construe the definition of disability in favor of broad coverage. Courts have also relied upon the EEOC's Notice of Proposed Rulemaking.

In ***Gil v. Vortex,* 2010 WL 1131642 (D. Mass. March 25, 2010),** an employee with monocular vision was terminated on January 2, 2009 (the day after the ADAAA's effective date) when he sought to return to work following surgery. The employee sued under the ADA claiming that his vision impairment substantially limited him in the major life activities of seeing and working. The court found that the employee had a disability as set forth in the broader interpretation of disability under the ADAAA and proposed regulations. The court found that the employee's claim that his employer took adverse action against him because of the fear that he would injure himself due to his impairment also created a claim for "regarded as" discrimination under the ADAAA. The court noted that the employee likely would not have been successful with that claim under the ADA of 1990.

In ***Horgan v. Simmons,* 2010 WL 1434317 (N.D. Ill. April 12, 2010),** an employee with HIV was terminated after he disclosed his HIV status to his employer. The employee filed suit claiming discriminatory termination and impermissible disability inquiries. Finding that the ADAAA governs the case, the court held that "functions of the immune system" constitute major life activities under the definition of disability. The court also stated that the EEOC's proposed regulations implementing the ADAAA list HIV as an

impairment that consistently meets the ADA's definition of disability. The court noted when Congress passed the ADAAA, it instructed courts that the "question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

In ***Hoffman v. Carefirst of Fort Wayne, Inc.,*** **2010 WL 3522573 (N.D. Ind. Aug. 31, 2010),** a terminated employee argued that his cancer, which was in remission at the time he left his employment, constituted a disability under the ADAAA. The plaintiff had worked as a service technician for a supplier of home medical devices when he was diagnosed with Stage III renal carcinoma and had a kidney removed. He returned to work a couple months later without restrictions. A year after his return, his employer said that service technicians would be required to work overtime - up to 70 hours per week. The plaintiff produced a note from his doctor limiting him to an eight-hour workday because of his cancer. The employer initially responded by saying that he would have to work overtime or resign, but later offered to let the plaintiff work out of another office, which would require a two-hour commute each day. The plaintiff did not accept the offer, and sued the company for disability discrimination. The employer argued that Congress could not have intended the ADA to apply to all cancer survivors in remission, and that the plaintiff's remissive cancer was not a disability because it did not substantially limit a major life activity. The court held that even though the plaintiff's cancer was in remission, it constituted a disability under the ADAAA. The Amendments made clear that immune system functions were major life activities, and they explicitly provided that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." The court also highlighted Congress's statement of intent that the focus of ADA inquiries should be "whether entities covered under the ADA have complied with their obligations," that the "question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." The court also pointed to the EEOC's proposed regulations, which explicitly listed cancer as an example of an impairment that was episodic or in remission but nonetheless an impairment that would consistently meet the definition of disability.

3. 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 Carreras v. Sajo, Garcia & Partners*****, 596 F.3d 25 (1st Cir. 2010);** ***EEOC v. Agro Distribution,*** **555 F.3d 462 (5th Cir. 2009);** ***Milholland v. Sumner County Bd. of Educ*****., 569 F.3d 562 (6th Cir. 2009);** ***Fredricksen v. United Parcel Service, Co.*****, 581 F.3d 516 (7th Cir. 2009);** ***Nyrop v. Indep. Sch. Dist. No. 11*****, 2010 WL 3023665 (8th Cir. Aug. 4,**

2010); *Becerril v. Pima County Assessor's Office,* 587 F.3d 1163 (9th Cir. 2009); *Hennagir v. Utah Dept. of Corrections*, 587 F.3d 1255 (10th Cir. 2009) and *Lytes v. D.C. Water and Sewer Authority*, 572 F.3d 936 (D.C. 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 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.

4. 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 posed an undue hardship. Now that more plaintiffs will be able to prove they have an ADA disability, litigation will focus 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. Rotating Shift
***Reville v. Niagara Frontier Transp. Auth.*, 2009 WL 5167645 (W.D.N.Y. Dec. 20, 2009),** an employee with mental illness took a medical leave of absence. When she returned, her doctor recommended that she only work the day shift. The employer temporarily allowed the employee to work only day shifts, but ultimately because of the burden on the other managers, the employer told the employee she needed to return to the rotating shift, as set forth in the job description. The employee was subsequently terminated when she showed up for the wrong shift. She sued under the ADA claiming that the employer's termination was discriminatory and that the employer failed to provide her with a reasonable accommodation. The court found that the employee was not "qualified" because she could not perform the essential functions of the job and that employers are not required to remove an essential function as a reasonable accommodation. The fact that the employer had temporarily permitted the employee to only work the day shift merely showed that the job could be restructured, not that the function of working rotating shifts was non-essential. (The court looked at the employer's job description and the terms of the collective bargaining agreement to support the finding that rotating shifts is an essential function of the job.)

b. Attendance
In ***Vandenbroek v. PSEG Power CT LLC,* 2009 WL 4730427 (2d Cir. Dec. 11, 2009),** plaintiff was terminated after violating his employer's attendance policy by not calling his supervisors when absent. He sued for discrimination under the ADA, arguing that he was in fact terminated due to his disability, alcoholism, which caused his attendance policy violations. The court held that regardless of whether plaintiff was terminated due to job performance or his disability, he failed to provide sufficient evidence that he could perform the essential functions of his job, and therefore could not make out a prima facie case of disability discrimination. Specifically, reliable attendance at scheduled shifts, which plaintiff was unable to fulfill, was found to be an essential function of his job. Plaintiff was therefore not a qualified individual for purposes of the ADA, and summary judgment was properly granted.

c. *Licensing*
In ***Fiumara v. President and Fellows of Harvard College,* 2009 WL 1163851 (1st Cir. May 1, 2009),** an employee was fired from his bus driver position because he did not have the type of driver's license that was required for the position. The court held that he did not establish a prima facie case for discrimination under the ADA; he was not qualified for the job because he did not have the requisite driver's license. The court also found that he did not request leave to get the license in a sufficiently specific manner; and the ADA does not require employers to grant employees indefinite leave.

3. 100% Healed Policies and Qualified to Perform Essential Functions

In ***Powers v. USF Holland, Inc.,* 2010 WL 558557 (N.D. Ind. Feb. 9, 2010)**, a truck driver took medical leave after a back injury. He sought to return to work, but had certain medical restrictions. However, the employer required the employee to be entirely free from medical restrictions before returning to work. The employee filed suit under the ADA and the employer sought to have the case dismissed claiming he was not qualified to perform the essential functions of the job. The court denied summary judgment stating that there was a question of fact as to whether the employer engaged in *per se* disability discrimination by having a 100% healed policy. The court said that employers that implement 100% healed policies precluding any individuals with injuries or illness from working may find themselves committing a *per se* violation of the ADA. Employers should instead conduct an individualized assessment of the individual's ability to perform the essential functions of the job with reasonable accommodations.

***See also, EEOC v. Sears, Roebuck & Co.,* 2005 WL 2664367 (N.D. Ill. July 22, 2005) (Settlement in Feb. 2010)** Court approved a $6.2M distribution for 235 former employees who were terminated at the end of Workers' Compensation leave. Inflexible leave policies are inconsistent with the interactive process and individualized assessment components of the ADA http://www.eeoc.gov/eeoc/newsroom/release/2-5-10a.cfm; and ***EEOC v. Supervalu, Inc.,* 2009 WL 4824697 (N.D. Ill. Dec. 15, 2009),** EEOC filed suit claiming, 'One Year and You're Out' and 'No Accommodation, No Restrictions' rules violates ADA. http://www.eeoc.gov/eeoc/newsroom/release/9-11-09.cfm.

C. Reasonable Accommodation

1. Interactive Process

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

In ***Lowe v. Independent School District No. 1,* 2010 WL 258400 (10th Cir. Jan. 25, 2010),** the school district planned to reassign plaintiff, who has post-polio and wears leg braces, to teach physical science in a small, crowded classroom. In preparation for this position, plaintiff compiled a list of accommodations that she believed would be necessary. The school failed to approve the accommodations and plaintiff resigned. Plaintiff claimed she was constructively discharged and brought this lawsuit. The district court granted summary judgment for the defendant, and the Tenth Circuit reversed this decision. The Tenth Circuit found that plaintiff established a genuine issue of material fact as to whether the school's failure to engage in the interactive process led to its failure to find an accommodation. The court found that there was a question of fact as to whether the employer has failed to interact in good faith and thus failed to reasonably accommodate, which precluded summary judgment for the employer. The Tenth Circuit emphasized that after plaintiff proffered a list of possible accommodations, defendant failed to respond for four months. It finally held a meeting, but even then, the Superintendent admitted that he did not prepare for the meeting and had not read the suggested accommodations.

In ***Lafata v. Church of Christ Home for Aged,*** **325 Fed. Appx. 416 (6th Cir. 2009),** plaintiff went on disability leave from her employment after injuring her shoulder and foot, and thereafter sought to return to work. The employer had already filled her prior position and offered her a lesser job on "take it or leave it" terms. Plaintiff filed an ADA claim against the employer, alleging a failure to accommodate. Reversing the district court, the Sixth Circuit held that a genuine issue existed as to whether defendant participated in good faith in the mandatory interactive process. While defendant offered a position to plaintiff, it was a lesser position offered on a "take it or leave it" basis with no discussion of the accommodations that could address her limitations.

In ***EEOC v. UPS Supply Chain Solutions*****, 2010 WL 3366256 (9th Cir. Aug. 27, 2010),** employee was deaf, used ASL to communicate, and read English at a 4th grade level. The employer agreed to provide an interpreter at monthly meetings. The employee then requested interpreters at weekly meetings, but the employer only agreed to provide the employee with written notes following the weekly meetings. The court help that an employer's duty to accommodate is a continuing duty that is not exhausted by one effort. The employer's obligation to engage in the interactive process continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. The court also made clear that the duty to accommodate extends to conditions of employment outside strict job duties, such as meetings.

In ***Fulton v. Goord,*** **591 F.3d 37 (2d Cir. 2009),** the wife of an incarcerated inmate had severe multiple sclerosis that required her to use a wheelchair and to rely on medical assistance for her daily needs. She could not travel to the hub facility where her husband was incarcerated and she requested that the state move her husband to a closer facility or otherwise provide an accommodation so that she could visit her husband. The state refused her request, citing its policy that inmates stay at the hub facility for two years. She sued under Title II and Section 504. The Second Circuit held that the state failed to engage in the interactive process to identify possible accommodations other than the transfer that she requested. (Example of the interactive process duty being imposed outside of the employment context)

In ***Richardson v. Friendly Ice Cream Corp.*****, 2010 WL 396388 (1st Cir. Feb. 5, 2010),** an assistant manager at a restaurant had limitations after shoulder surgery (no lifting over 5 pounds or repetitive manual activity) Her duties included lifting objects more than 10 pounds with one hand. She sought an accommodation to have others do the tasks that she could no longer do, but the employer refused and she ultimately was terminated and sued under the ADA claiming that the employer failed to engage in the interactive process in response to her accommodation request. At her deposition, she testified that she "needed to be able to do everything." The court found for the employer and stated that an interactive process claim cannot succeed unless the employee can show there was a reasonable accommodation that would have been discovered, and delegating essential functions to others, as the employee was requesting was not reasonable. ***See also, Iverson v. City of Shawnee Kansas,*** **2009 WL 1678195 (10th Cir. June 17, 2009), (**employer had no obligation to engage in the interactive process

unless the employee demonstrates that a reasonable accommodation was possible); ***McKane v. UBS Financial Services, Inc.,* 2010 WL 227648 (11th Cir. Jan. 19, 2010)** (because employee did not identify accommodation that could resolve workplace problem, employer did not have an obligation to engage in the interactive process to try to find another accommodation); ***McMillan v. USPS***, **2010 WL 1791268 (N.D. Ill. May 5, 2010)** (employer not liable for breakdown in interactive process when employer can show that no reasonable accommodation was possible**)**

In ***Gratzl v. Office of the Chief Judges*, 601 F.3d 647 (7th Cir. 2010),** a court reporter who worked only in courthouse control room had incontinence and required regular restroom breaks. The employer eliminated specialist position and required all court reporters to rotate among courthouses and courtrooms. The employee requested accommodation of remaining in the control room in order to maintain regular access to restroom. The employer offered to assign employee only to courtrooms with adjacent restrooms, but would not relieve her of rotation duty
Employee refused proposed accommodations without explaining why they were insufficient
The court found in favor of the employer finding employer fulfilled accommodation duty with the proposals it offered and the employee failed to explain why employer's proposals were inadequate.

2. Leave as a Reasonable Accommodation
Background: While leave from work has been recognized as a type of reasonable accommodation, courts frequently have found leave to be unreasonable when it is indefinite.

In ***Verrocchio v. Federal Express Corp.,* 2010 WL 610339 (N.D.N.Y. Feb. 17, 2010),** plaintiff experienced an on-the-job injury requiring nine months of medical leave. Plaintiff was still unable to return to work at that point, and defendant fired him, prompting plaintiff to file suit under the ADA. Defendant filed a motion to dismiss, asserting that plaintiff was not "qualified" because he was unable to return to work or perform his essential job functions. The court denied defendant's motion; in so doing, the court stated that leave could be a reasonable accommodation under the ADA. "If additional medical leave" would have enabled Plaintiff "to perform the essential functions of the job," then he would be qualified. As this case continues, plaintiff will have to show that additional medical leave was a reasonable accommodation under the circumstances.

In ***Mayhew v. T-Mobile USA, Inc.,* 2009 WL 5125642 (D. Or. Dec. 22, 2009),** plaintiff worked as a customer service representative. She requested time off to care for her son's disabilities and was denied. She then requested a "work-when-able" schedule to accommodate her own heart condition, but defendant terminated her employment before addressing her request. Plaintiff then brought a lawsuit alleging a failure to accommodate, and defendant filed a motion for summary judgment. The court granted defendant's motion for summary judgment as to plaintiff's request to care for her son, because ADA accommodations must be based on plaintiff's own disability—not that of a

family member. However, the court denied defendant's motion as to plaintiff's request to have a "work-when-able" schedule. It noted that due to the unique nature of a customer service job, attendance is less significant than with other jobs. Plaintiff presented evidence that her unpredictable absences had little to no effect on defendant's call center, customer wait times, or call quality.

In ***Colby v. Pye & Hogan,*** **602 F.Supp.2d 365 (D. Conn. 2009),** an employee with cancer sought leave as a reasonable accommodation. The employee was ultimately terminated and he sued under the ADA. The court found that while extra time off to allow a cancer patient to get the necessary treatment was a reasonable accommodation in some circumstances, plaintiff's failure to notify his employer of when he would be taking that time, as well as taking more time than was authorized were sufficient grounds for valid termination. The Court found that plaintiff was not qualified under the ADA, in that he was unable to meet his regular attendance requirements of the job, and requests for unlimited and unscheduled leave were unreasonable.

In ***Crabb v. SIU Sch. of Med.***, **2010 WL 1790362 (C.D. Ill. Apr. 29, 2010),** an employee received intermittent FMLA leave to treat anxiety and depression. He was hospitalized after exhausting FMLA leave and did not return to work. The court held that an employee is “not entitled to receive unlimited time off in her sole discretion.” Employers are generally permitted to treat regular attendance as an essential job function. Employers not required to permit indefinite leave as a reasonable accommodation

3. Employer Only Required to Accommodate Known Disabilities
Background: When an individual decides to request an accommodation, the individual or
his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.

In ***Smith v. Grattan Family Enterprises, LLC,*** **2009 WL 3627953 (E.D. Mich. Oct. 30, 2009),** an employee who had a hip and bone problems was experiencing severe leg pain. He mentioned the pain to his employer and that he “couldn't stand on it much longer.” The employee claims this should have triggered the employer to provide him with some type of reasonable accommodation. The court held that an employer cannot be deemed to be on notice of a disability when an employee does nothing more than complain of having difficulties with his or her job, but never tells the employer that those difficulties stem from a condition of disability. Accordingly, there was no viable claim for failure to accommodate.

In ***Keeler v. Florida Department of Health,*** **2009 WL 1111551 (11th Cir. Apr. 27, 2009),** plaintiff asked her employer to transfer her to another position, claiming that her current position was too stressful and overwhelming. Her employer denied her request and said that she was "doing fine" in her current position. During a subsequent meeting, she "broke down" and started to cry. During the week after this meeting, she was reprimanded twice; once for working late without approval and once for failing to

complete her assigned tasks in a timely manner. After these incidents, Keeler disclosed to her employer that she was diagnosed with ADHD and Obsessive Compulsive Disorder. Prior to these events, she had not told her employer about her mental impairments. The plaintiff was terminated from her position shortly after the disclosure. She sued under the ADA and argued that her employer failed to accommodate her disability when it refused to transfer her to a new position. The court held that the employer did not violate the ADA because it did not know about her alleged impairments when it denied her request. She did not reveal her disability until after the employer made its decision. She argued that her behavior – complaining about how stressful her job was and crying during a meeting – should have put her employer on notice on her disability. The court found that these behaviors were not sufficient to put the employer on notice because they did not suggest that she was substantially limited in a major life activity. *See also*, ***Stewart v. St. Elizabeth's Hospital,*** **589 F.3d 1305 (D.C. Cir. 2010)** (hospital not required to accommodate employee with mental illness when there was no actual or constructive knowledge of the employee's disability)

4. Creating New Positions as Reasonable Accommodation

Background: Generally, to comply with the reasonable accommodation provisions of the ADA, an employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.

In ***Fink v. Richmond,*** **2009 WL 3216117 (D. Md. Sept. 29, 2009),** the plaintiff, a teacher, had Barrett's esophagus, a pre-cancerous condition which resulted in the surgical removal of her esophagus. Plaintiff argued that defendant failed to provide her with her requested accommodations and sued under the ADA. The court found that the district did not fail to accommodate plaintiff and granted defendant summary judgment on this claim. Plaintiff argued that defendant should have created a new administrative position for her. However, the court rejected this argument, finding that the ADA does not require the creation of new positions.

In ***Johnson v. Cleveland City Sch.*****, 344 Fed. Appx. 104 (6th Cir. 2009),** a teacher developed cervical myelopathy. She had a number of medical restrictions (no standing for more than 1 hr/day; no continuous speaking; minimal use of stairs). To address those restrictions, one school created a new position. However, the new deputy chief at school district didn't like this and he reassigned the teacher to a different school where the position did not exist. The teacher was not able to continue and went on extended leave. As no small classroom or counseling positions were available, the teacher was terminated and she sued under the ADA. The court found in favor of the school district finding that creating a new position is not a reasonable accommodation. The court went on to hold that even though the first school created a position, the district is not required to continue to go beyond ADA requirements.

5. Employers Must Provide Effective Accommodation, Not Preferred Accommodation

Background: An employer need not provide an employee's *preferred* accommodation as long as the employer provides an *effective* accommodation. However, employers should give primary consideration to the employee's preference. See EEOC Enforcement Guidance on Reasonable Accommodation & Undue Hardship under the ADA www.eeoc.gov/policy/docs/accommodation.html

In ***Edwards v. Tacoma Public Schools,*** **2008 WL 1817379 (9th Cir. April 9, 2008),** a teacher with a disability requested that the school provide her with a full-time assistant as an accommodation. At the school's request, the teacher listed the tasks she would like the assistant to perform, which included some essential functions of the teacher's job. The school had provided other accommodations for the teacher, but refused to hire a full-time assistant as the teacher had requested. The Ninth Circuit affirmed the district court's award of summary judgment to the school district. The court acknowledged that a full-time assistant may be more efficient and preferable to plaintiff, but stated that an employer is not obligated to provide an employee the accommodation she requests or prefers, the employer need only provide a reasonable accommodation that is effective.

In ***Ekstrand v. School District of Somerset,*** **583 F.3d 972 (7th Cir. 2009),** a teacher with seasonal affective disorder requested a classroom with natural light and identified other issues that exacerbated her condition, including noise distractions, inadequate ventilation, and the untimely manner the school installed necessities. Although the school remedied some of these issues, it failed to reassign her to a room with natural light. As a result, plaintiff needed to take medical leave. On November 28, 2005, she provided a note to the school district from her doctor indicating the importance of natural light for an individual with seasonal affective disorder, and the link between teacher's room location and the symptoms of her disability. The school still did not provide her request. The teacher sued for failure to accommodate and the district court granted summary judgment to the school. The Seventh Circuit reversed and stated that an employer is not obligated to provide a specifically requested accommodation unless the employer is made aware of its medical necessity. In this case, once the teacher provided the school with medical documentation of the necessity of a classroom with natural light, the school had an obligation to try to accommodate her. It noted that this accommodation could have been accomplished, as one classroom with windows was empty, and a first grade teacher who was willing to switch used the other.

6. Removal of an Accommodation

Background: Once an employer provides a reasonable accommodation, there usually needs to be justification for the removal of the accommodation.

In ***Livingston v. Fred Meyer Stores, Inc.*****, 2010 WL 2853172 (9th Cir. July 21, 2010)**, plaintiff, who worked as a wine steward, had a vision impairment that impacted her ability to walk and drive safely after dark. Her employer granted her request for a modified schedule during fall and winter that minimized her night driving. The next year, however, the employer removed this accommodation, despite not experiencing any

hardship from the accommodation during the previous year. The plaintiff's wine sales actually increased during her modified schedule. The court of appeals reversed the district court's grant of summary judgment to the employer. The Ninth Circuit has recognized that employers have a "duty to accommodate an employee's limitations in getting to and from work," and that employers may have to make reasonable shift changes as an accommodation when an employee's difficulty getting to and from work is disability-related. Although the plaintiff's vision impairment did not impact her performance at work, it did affect her ability to finish her shift and her employer therefore had a duty to accommodate. The court found it significant that the employer had not provided any evidence of undue hardship to continue the accommodation. (***But see, Hill v. Verizon Maryland, Inc***, **2009 WL 2060088 (D. Md. Jul. 13, 2009)**, if an employer provides more than what is required by the ADA, the employer should not be punished for its generosity, and employer's actions should not necessarily be deemed a reasonable accommodation.)

7. Working at Home as a Reasonable Accommodation

Background: The EEOC has issued a fact sheet addressing working at home as a reasonable accommodation under the ADA. www.eeoc.gov/facts/telework.htm The EEOC does not interpret the ADA to require an employer to create a teleworking policy. However, the EEOC did find that people with disabilities should be able to participate in such a program if it exists and an employer may have to make modifications to such a policy to accommodate a person with a disability. Also, if an employer does not have a teleworking policy, the EEOC's position is that employers have to consider such an accommodation for a person with a disability.

In ***Kiburz v. England,*** **361 Fed. Appx. 326 (3d Cir. Jan. 19, 2010),** a former information technology specialist initially requested a flexible work schedule to accommodate his sporadic back pains caused by severe spinal arthritis; he could only work a few days a week since these random episodes required complete immobilization. The employer partially granted this request, but denied his additional request to work from home as needed because the defendant believed that the plaintiff would not and could not fulfill his essential job functions working from home. (Job functions included providing technical support to customers/colleagues, attending meetings and trainings, achieving effective working relationships with customers and coworkers.)

The employee then sued for disability discrimination under Section 504 of the Rehab Act. The district court granted summary judgment in favor the employer. On appeal, the Third Circuit affirmed finding that working from home would prevent the employee from performing a substantial portion of essential job functions and was therefore unreasonable***. See also, Page v. Liberty Central School District*****, 2010 WL 176791 (S.D.N.Y. 2010)** (telework not a reasonable accommodation for librarian with multiple chemical sensitivity because being physically present was an essential function)

In ***Graffius v. Shineki,*** **2009 WL 4724617 (D.D.C. Dec. 11, 2009)**, plaintiff, an employee for the Department of Veterans Affairs ("VA"), had diabetes, carpal tunnel syndrome, neuropathy, and compacted bowel syndrome. As a result, the VA allowed

her to work from home as an accommodation. Subsequently, the VA determined that the arrangement was no longer feasible, and insisted that she begin working in the office. After the VA denied other accommodation requests, plaintiff was eventually terminated for excessive unexcused absences. Plaintiff sued alleging, among other things, that it was unreasonable to discontinue the telework accommodation and the defendant filed for summary judgment. The court denied summary judgment reasoning that the employee's job description had not changed, and she had previously worked successfully from home, as evidenced by performance appraisals. Since the accommodation appeared to be effective and the employer had not provided any evidence that the accommodation constituted an undue hardship, the case was allowed to continue.

8. Accommodations obligation even when no affirmative request
Background: It is typically the responsibility of the person with the disability to initiate the discussion about accommodations, unless the need for the accommodation is obvious.

In ***Kutrip v. City of St. Louis, Division of Corrections,* 2009 WL 1175519 (8th Cir. May 4, 2009),** an inmate had mobility impairments that made showering difficult. As an accommodation he needed an accessible shower or a plastic chair he could hold onto in the shower. He was never told that a shower with grab bars was available at the facility and he sued under Title II of the ADA. The court rejected the State's arguments that it was not liable because the inmate did not directly request an accommodation since the need for the accommodations was obvious.

9. Undue Hardship
Background: Employers do not need to provide a reasonable accommodation if it would be an undue hardship, defined as "significant difficulty or expense." 29 C.F.R. § 1630.2(p).
Factors to determine whether an accommodation is an undue hardship include:
(1) the employer's type of operation;
(2) the employer's overall financial resources;
(3) the [cost] of the reasonable accommodation; and
(4) the impact of such accommodation upon operations"
See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA www.eeoc.gov/policy/docs/accommodation.html

In ***Moore v. Computer Assoc. International*, 2009 WL 2870213 (D. Ariz. Sept. 2, 2009),** an Instructional Consultant provided in-person training for products. He developed major depression, paranoid schizophrenia, and bipolarity. He went on leave and was eventually terminated. Prior to termination, he had requested various accommodations including extended leave that had been denied. He sued under the ADA for failure to accommodate. The court ruled in favor of the employer finding that extended indefinite leave would cause an undue hardship, as it would have required hiring expensive independent contractors or canceling classes that the plaintiff taught. To support its undue hardship argument, the defendant presented a memo analyzing

economic impact on company to provide the requested accommodation. (Good practice for employers if relying upon an undue hardship argument.)

D. Direct Threat

1. Background

Under the ADA, an employer may exclude someone with a disability 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. Workplace Safety

In ***Mayes v. Whitlock Packaging Corp.*, 2010 WL 1754200 (E.D. Okla. Apr. 29, 2010)**, the plaintiff, who had epilepsy that could not be controlled with medication, worked for a beverage manufacturer as an accounting clerk. When the plaintiff experienced a petit mal seizure, she lost awareness of her surroundings and had trouble remembering. Within a few months of her employment, she had fifteen seizures. During one seizure, she hit her head, bled, and broke her glasses. During another, she tightly grabbed the arm of a coworker who tried to assist her, leaving indentations in the coworker's skin. She was ultimately terminated for committing violence in the workplace after having a seizure during which she bit a coworker. The court held that plaintiff was a direct threat and noted that the individualized assessment does not require the employer to obtain an independent medical examination. The plaintiff admitted that she had fifteen seizures while employed, some of which resulted in injuries to herself and others. The court underscored the plaintiff's admission that if someone approached her during a seizure, she would become physically aggressive. The court found that requiring employees to avoid going near the plaintiff while she was having a seizure would have been unreasonable.

In ***Wurzel v. Whirlpool Corp.*, 2010 WL 1495197 (N.D. Ohio Apr. 14, 2010)**, the plaintiff was employed as a materials handler, a position that entailed driving a tow motor. Years later, the plaintiff was diagnosed with a heart condition that caused unpredictable artery spasms, leading to tightness in his chest, shortness of breath, numbness, dizziness, and fatigue. The company physician released him to work with the restriction that he could not drive company vehicles. This restriction required the plaintiff to compete for other positions in the company. He obtained another position, but had several more artery spasms and did not fully inform his own physician, who cleared him without restrictions, of the frequency or severity of his spasms. The court granted summary judgment to the employer. Applying the direct threat factors, the court stressed that the duration of the risk is not the duration of any particular episode, but rather the "longevity of the underlying condition." On the likelihood of potential harm, the court noted that "likelihood is not the same as certainty," and that employers need not wait for harm to occur to take action. On the imminence of the potential harm, the court said that although the plaintiff's spasms may not have presented a risk that was

immediate “at every instance and at every moment,” the spasms were sufficiently likely to occur to satisfy the imminence factor.

In ***Rojek v. Catholic Charities of Jackson, Inc.*, 2010 WL 2232240 (E.D. Mich. May 27, 2010)**, a social worker who was blind sued the defendant, an outpatient mental health facility, for refusing to interview her for a clinical therapy position. The position required social workers to make occasional home visits to investigate claims of child abuse or neglect. The employer argued that the plaintiff’s blindness posed a direct threat because the job frequently required visits to dangerous neighborhoods and to houses in poor condition. The employer asserted that therapists could be subjected to threats of violence, weapons, and dangerous animals, and that the plaintiff’s blindness prevented her from quickly ascertaining these dangers and leaving a home. Further, the employer argued that her inability to see physical signs of abuse and neglect posed a threat to the safety of referred clients. The court rejected these arguments and held that a jury could decide whether the plaintiff posed a direct threat. The court observed that the dangerous conditions existed for all therapists. The plaintiff was aware of exits and could navigate with a cane. As for the safety of others, the plaintiff had over twenty-five years of social work experience and had developed non-visual ways of investigating abuse. Because the employer’s expert witnesses had no experience with social workers who were blind, the court concluded that the direct threat defense was based in part on generalizations.

3. Perceived or Real Threats of Violence

In ***Bodenstab v. County of Cook***, **569 F.3d 651 (7th Cir. 2009),** anesthesiologist was terminated for stating that, if his cancer had spread, he intended to kill his supervisor and co-workers. He also mentioned the possibility of dying in “ensuing gun battle with police.” He was terminated and filed suit against his employer. The court found in favor of the employer finding that the employer had no legal obligation to accommodate conduct, as opposed to a disability, even if the misconduct is related to a disability.”

In ***Calandriello v. Tennessee Processing Center, LLC,* 2009 WL 5170193 (M.D. Tenn. Dec. 15, 2009),** employee with bipolar disorder placed a poster in his cubical, which parodied a corporate inspirational poster by inserting a picture of Charles Manson. The employer asked him to remove the poster, and put a note about it in his personnel file. Shortly thereafter, the employee disclosed that he had bipolar disorder, which caused the lapse in judgment. He asked that his conduct be exempt from disciplinary action under the ADA. Around this same time, the employer observed the employee viewing violent websites on the Internet, including cites classified as military, adult material, weapons, militancy extremist, and racism. Because it was concerned that the employee was a threat to the workplace, the employer terminated the employee. He filed suit alleging that the employer failed to provide him with a reasonable accommodation and that it unlawfully terminated him because of his disability. The court granted summary judgment for the employer finding that the employer had provided a legitimate nondiscriminatory reason for his termination – that it was reasonably concerned about the possibility of workplace violence because of plaintiff’s behavior.

4. Objective and Individualized Medical Evidence

In ***EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505 (W.D. Pa. Mar. 12, 2010)**, an applicant's conditional offer of employment was revoked after the urine sample that he gave during the mill's medical examination tested positive for methadone. The applicant explained that he was prescribed methadone to treat his chemical dependency. The physician recommended that the applicant not perform "safety sensitive" work due to his medications. The physician had not personally visited the copper mill but had driven by it and learned about the specific job requirements from Human Resources. The EEOC argued that the employer's physician did not have sufficient experience with methadone to draw such conclusions, and that the physician based his conclusions on the applicant's initial failure to disclose his methadone use rather than on objective evidence. Citing the Supreme Court's decision in *Bragdon v. Abbott*, the district court emphasized that the direct threat defense is a high standard that must be based on a "rigorous objective inquiry." The court held that the employer did not meet its high burden of showing that the applicant's methadone use created a "high probability of substantial harm to himself or others." The employer's physician speculated on future side effects and acknowledged that a neurological exam would have been appropriate given individuals' unique responses to opiates. Rather than give the applicant a neurological exam, the physician relied upon medical literature to acquire knowledge about methadone's side effects. The court also pointed to the EEOC's interpretive guidance on the ADA, which says that input from the individual with the disability is relevant to the direct threat analysis. The physician did not ask the applicant about whether he experienced side effects, nor did he ask the applicant's own physician or drug counselor about side effects. Further, it was unclear whether the physician consulted the applicant's complete medical and work history. The court therefore could not conclude as a matter of law that the employer conducted an objective individualized assessment.

In ***Doe v. Deer Mt. Day Camp,* 2010 WL 181373 (S.D.N.Y. Jan. 13, 2010),** plaintiff was a child with HIV who wanted to attend basketball camp. When the camp learned of HIV status, his admission was denied. After an ADA suit was filed, the camp claimed the refusal to admit was justified because plaintiff was a "direct threat." The court found in favor of the plaintiff holding that the camp failed to show that plaintiff's HIV status would pose a significant risk of substantial harm, and therefore failed to meet the burden for direct threat**.** The court also held that the nurse's good faith belief of threat was insufficient, as decisions on direct threat must be based on objective medical evidence.

5. Service Animal as a Direct Threat

In ***Roe v. Providence Health System Oregon,* 655 F. Supp. 2d 1164 (D. Or. 2009),** a frequent hospital patient with a neurological condition used a St. Bernard to help steady her when she stood up and also to retrieve objects she dropped. For a while, the hospital allowed her to bring in her dog whenever she was admitted. However, the hospital began receiving complaints that the dog gave off a strong odor and raised concerns about spreading infection. The dog also caused problems by getting in the way of hospital staff and adding to their workload in providing care for the dog. The

hospital attempted to work with the patient to address these problems, but she refused and the hospital no longer allowed her to bring the dog to the hospital. The patient sued the hospital under Title III of the ADA. The court found in favor of the hospital and relied on the fact that the hospital had an extensive history of permitting service animals belonging to other patients without incident or complaint. The hospital's concerns regarding the risk of infection, the care and supervision of the dog, and the adverse effect the dog had on other patients and staff members were reasonable. The court concluded that the dog presented a direct threat to hospital patients and staff and could be excluded.

E. 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 ***Cottrell v. J & R Disc. Liquor Gallery, Inc.,*** **2009 WL 1085729 (D.N.J. April 21, 2009),** the caregivers of a girl with profound disabilities made complaints against various businesses that did not have accessible parking, including a liquor store. Following the complaint, the liquor store owner banned them from the store. They sued for discrimination and retaliation under the ADA. The court dismissed the discrimination claim since they did not have an ADA disability. However, the court ruled that the caregivers could move forward with the retaliation claim. The court held that they suffered the injury of being banned from the store's premises for opposing activity that violated the ADA, and unlike the discrimination provisions, the retaliation provisions did not require that the plaintiffs have a disability.

3. Was There an Adverse Action to Support a Retaliation Claim?
A retaliation claim can only be successful if the plaintiff can show the employer took an adverse action in response to the plaintiff's exercise of his/her civil rights.

In ***Mogenhan v. Department of Homeland Security*, 613 F.3d 1162 (D.C. Cir. 2010)**, an employee with migraine headaches received a negative performance review. She filed a complaint with the EEO, alleging that the negative review constituted gender and disability discrimination. A few months later, she received a second negative review. Additionally, the plaintiff's supervisor posted her complaint on the Department's intranet and increased her workload. The court held that the plaintiff may have suffered a materially adverse employment action sufficient to support a retaliation claim. Her supervisor's posting of her EEO complaint may have dissuaded a reasonable employee from further engaging in protected activity. Additionally, the increase in her workload after filing the complaint may have dissuaded a reasonable employee from engaging in protected activity.

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, such as filing with the EEOC or requesting a reasonable accommodation.

In ***Ross v. Independent Living Resource of Contra Costa County*, No. C08-00854, 2010 WL 2898773 (N.D. Cal. July 21, 2010)**, plaintiff, who is quadriplegic and uses a wheelchair, sued a sports facility for being inaccessible. The sports facility subsequently announced its closure due to the law suit and the plaintiff's agency, a disability advocacy organization, received negative publicity because of the suit filed by the employee. Shortly thereafter, plaintiff was terminated, ostensibly for budgetary reasons. Plaintiff sued and claimed he was retaliated against for exercising his ADA rights. In support of the plaintiff, another employee testified that the executive director told her that the agency could not have an employee who made the organization "look bad." No employees could recall that the director had decided to terminate the plaintiff before the negative publicity, and four employees received raises two days before the plaintiff's termination. The court held that these facts created a triable issue on whether the plaintiff was terminated for engaging in the protected activity of filing an ADA lawsuit. Although the employer was experiencing fiscal problems, this proffered reason may have been pretext.

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 ***Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.,*** **2010 WL 522328 (10th Cir. 2010),** a speech-language pathologist had been advocating for the rights of a particular high school student for several years and she also had been complaining that that the school was generating inaccurate lists of students eligible for speech and language services, resulting in qualified special education students not receiving speech and language services. Eventually, she filed a complaint with the state education department. The state investigated and ordered the school to take corrective action. Thereafter, the employee was notified that her caseload and salary were being reduced. When her caseload subsequently increased, she requested an increase in her salary, but was denied. She filed suit under Section 504. The district court found in favor of the school, but the Tenth Circuit Court of Appeals reversed. The court first found that her advocacy on behalf of the individual student, her longstanding complaints about school's failure to deliver services and her filing the state complaint were all protected activities under Section 504. The court then found a causal connection between her protected activity and the adverse employment action based on the close proximity between her protected activity and the adverse conduct.

In ***Ross v. Independent Living Resource of Contra Costa County*****, 2010 WL 2898773 (N.D. Cal. July 21, 2010)**, as described above, an employee claimed he was terminated because of bad publicity arising from filing an ADA lawsuit. With respect to whether the plaintiff could demonstrate a causal connection to support his retaliation claim, the court found that the plaintiff showed a causal link between his protected activity and his termination. Only a brief amount of time elapsed between the negative publicity and his termination, and the director admitted that he was troubled by the plaintiff's involvement in the lawsuit. The urgency with which the director carried out the termination may have indicated that the termination was not based on a budgetary decision made earlier. Further, the plaintiff had been assured prior to the publicity that his job was secure, and the employer had already made layoffs and was even giving raises and hiring
new employees at the time of plaintiff's termination.

6. Are Damages Available in ADA Retaliation Cases?

The courts are split over whether plaintiffs can recover damages in an ADA retaliation claim. In addition to limiting damages, plaintiffs may also be denied access to a jury trial if there are no claims in which damages can be awarded. The remedies under the ADA generally emanate from the Civil Rights Act of 1964 which provided that a court may order certain equitable relief including, but not limited to, back pay, but does not provide for compensatory or punitive damages.

However, Congress subsequently passed the Civil Rights Act of 1991, which expands the remedies under the Civil Rights Act of 1964 to include compensatory and punitive damages when the defendant has engaged in "unlawful intentional discrimination." Some courts have held that this provision is broad enough to encompass retaliation. ***[See Kramer v. Banc of America Securities,*** **355 F.3d 961 (7th Cir. 2004),** ***Johnson v. Bozarth Chevrolet*****, 297 F. Supp. 2d 1286 (D. Colo. 2004),** ***Cantrell v. Nissan North America,*** **2006 WL 724549 (M.D. Tenn. Mar. 21, 2006);** ***Rumler v. Dep't of***

***Corrections,* 546 F. Supp. 2d 1334 (M.D. Fla. 2008)]**; whereas other courts have held that retaliation is outside of the scope of the Civil Rights Act of 1991, and therefore no compensatory or punitive damages are available. **[*See Edwards v. Brookhaven Science Associates, LLC,* 390 F.Supp. 2d 225 (E.D. N.Y. 2005), *Ostrach v. Regents of the Univ. of California*, 957 F. Supp. 196 (E.D. Cal. 1997)]** Below are two recent cases taking opposing views on this issue:

In ***Alvarado v. Cajun Operating Co.,* 588 F.3d 1261 (9th Cir. 2009),** an employee of a Church's Chicken restaurant, complained about pain he was having in his hands due to arthritis. He was later terminated, and he sued his former employer for retaliation under the ADA. The district court granted the employer's motion to bar the plaintiff from seeking punitive and compensatory damages, and from obtaining a jury trial on his claims. The Ninth Circuit affirmed, holding that punitive and compensatory damages are not available for a retaliation claim under the ADA. The court relied on the plain language of the ADA and other relevant statutes. Specifically, the 1991 Civil Rights Act expanded the remedies available for specified ADA violations to include punitive and compensatory damages. Retaliation was not one of those specified violations. While recognizing that courts are split on the issue, the Ninth Circuit interpreted this to mean that Congress did not intend to provide for punitive or compensatory damages in ADA retaliation cases. Furthermore, because no compensatory or punitive damages were available, and therefore only equitable relief was available, the plaintiff was also not entitled to a jury trial.

In ***Baker v. Windsor Republic Doors,* 2009 WL 2461383 (W.D. Tenn. Aug 10, 2009),** an employee for a door manufacturer had a pacemaker installed due to cardiomyopathy, but was otherwise cleared to return to work. However, plaintiff's employer would only allow him to return to work if he signed an agreement waiving his workers' compensation rights. The plaintiff refused and subsequently sued for retaliation under the ADA. A jury awarded him back-pay and compensatory damages. The employer argued that damages should not have been awarded by the jury for retaliation. The court disagreed and upheld the compensatory damages award, holding that a civil rights statute providing for damages in cases of intentional discrimination in employment extended compensatory damages to retaliation claims under the ADA. The court explained that, unless a statute indicates otherwise, retaliation falls within discrimination in civil rights claims.

F. Ministerial Exception

In ***EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 2010 WL 700190 (6th Cir. Mar. 9, 2010),** a teacher at a religious school was diagnosed with narcolepsy and took an extended leave of absence. She was medically cleared to return to work, but the school administration expressed concern about whether the teacher's condition would jeopardize the safety of her students, and she was ultimately terminated. She sued under the ADA and the religious school claimed it was not covered by the ADA because of the "ministerial exception." The Sixth Circuit ruled in favor of the teacher finding that a grade school teacher who taught primarily secular topics fell outside the exception and may pursue her claim under the ADA.

The court explained that for the ministerial exception to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee." The Court found that the defendant failed to make out a case for factor (2). "The overwhelming majority of courts that have considered the issue have held that parochial school teachers who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception." Reviewing this particular case, the court found that the plaintiff spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects, using secular textbooks, without incorporating religion into the secular material.

G. Association Discrimination

In ***Loeffler v. Staten Island University Hospital*, 582 F.3d 268 (2d Cir. 2009),** a cardiac patient who is deaf, and his minor children who are not deaf, repeatedly requested sign language interpreters, but the hospital failed to secure interpreters, and instead relied on the children. Suit was filed under the ADA and Section 504 and included a claim of associational discrimination on behalf of the minor children. The court held that the children had standing to sue for associational discrimination because they suffered emotional harm from having to miss school, having to be confronted with their father's illness, and trying to interpret and communicate complex medical information. Even though the children were not individuals with disabilities who needed interpreter services, the hospital's failure to provide the services to their parents harmed them. (The dissent argued that association discrimination not applicable because the children were not prevented from obtaining services themselves.)

In ***Sandford v. Slade's Country Stores*, 2010 WL 1416134 (M.D. Ala. Apr. 7, 2010),** plaintiff was hired to work at a store. During her interview plaintiff disclosed that she had a child with a disability. Although the employer had an insurance plan for employees, where the employer paid for half of the premium, the plaintiff claims the insurance plan was never offered to her. She contended that she was not offered insurance through her employer because of her son's disability. She supported this contention by comments made by her supervisor about there being too many medical issues and personal problems in her family. She was ultimately terminated for excessive tardiness and failure to properly clock in and out using the time close. She filed suit under the ADA claiming that both her termination and the lack of insurance benefits arose from association discrimination based on her being the parent of a child with a disability. First, the court dismissed her association discrimination claim focused on her termination. The court reviewed her attendance records and found that she was in fact excessively tardy. The court found that this no longer made her "qualified" and if she was not "qualified," she could not make a claim for association discrimination with respect to the decision to terminate her employment. However, the court found that the plaintiff could go forward with her claim of association discrimination with respect to the employer's failure to provide her with insurance benefits. Plaintiff produced evidence that she disclosed her son's disability to her supervisors, and that her supervisor told her no insurance was available, even though it was given to other employees who did not have family members with disabilities. She was qualified to receive insurance benefits after 90 days of employment, and at that time, she had not had any tardiness problems that rendered her "unqualified" at the time of her termination.

H. Sidewalk Accessibility

In ***Culvahouse v. City of LaPorte Indiana*, 679 F.Supp.2d 931 (N.D. Ind. 2009)**, plaintiffs sued the City arguing that its failure to repair or improve sidewalks violated Title II of the ADA. Both parties filed motions for summary judgment; the court denied defendant's motion and granted plaintiffs' motion in part. The court held that the ADA is to be construed broadly and public sidewalks fall within the scope of a city's services, programs, or activities. The City argued that it does not own the sidewalks and therefore has no ADA obligation to ensure their accessibility. The court rejected this argument and explained that Indiana courts have recognized municipalities' authority and duty to keep sidewalks in a reasonable safe condition for use by the public. The court also rejected the City's argument that maintaining the sidewalks would be a fundamental alteration because the City had historically constructed and repaired sidewalks. Further, the court rejected the City's argument that compliance would amount to an undue burden because the City failed to consider alternative financing options or alternative methods of the delivery of its services to people with disabilities.

In ***Frame v. City of Arlington,* 616 F.3d 476 (5th Cir. 2010),** residents who use wheelchairs brought a Title II ADA action alleging that the city failed to make its curbs, sidewalks and certain parking lots wheelchair-accessible. The court recognized that plaintiffs had a private cause of action to enforce compliance with Title II of the ADA to extent they claimed that the noncompliance with the regulations denied them meaningful access to a service program or activity. However, the court found that sidewalks, curbs and parking lots are not services, programs or activities within the meaning of Title II. Instead, the court held that they are "facilities" and function as "gateways" to services, programs or activities. [**NOTE:** This interpretation is contrary to all other Circuit Courts of Appeals decisions on this issue. All other courts have interpreted services, programs and activities more broadly. ***See Barden v. City of Sacramento,* 292 F.3d 1073 (9th cir. 2002)** (because a sidewalk can be characterized as a "normal function of a government entity" public sidewalks fall within the scope of Title II); ***Johnson v. City of Saline,* 151 F.3d 564 (6th Cir. 1998)**(the phrase services, program or activities encompasses virtually everything that a public entity does); ***Innovative Health Systems Inc. v. City of White Plains,* 117 F.3d 37 (2nd Cir. 1997)(**services, programs and activities is a catch-all phrase that prohibits all discrimination by a public entity); ***Yeskey v. Commonwealth of Pennsylvania Department of Corrections,* 118 Fl.3d 168 (3rd Cir. 1997)** (services, programs and activities is intended to apply to anything a public entity does)]

I. 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 Was Found to Lack Standing

In ***Brown v. Grand Island Mall Holdings, Ltd.,*** **2010 WL 489531 (D. Neb. Feb. 8, 2010),** plaintiff, with spinal muscular atrophy and uses a wheelchair, sued defendant under Title III of the ADA, alleging that its shopping center contained several physical barriers, and asking for an injunction to remove these barriers. Defendant filed a motion to dismiss based on the argument that plaintiff did not have standing to sue. The court granted defendant's motion and stated that in order to demonstrate a likelihood of future injury, and thereby have standing to file suit, plaintiff had to show that she would visit the building in the imminent future, but for those barriers. Plaintiff did not sufficiently express any definite plan to return to the shopping center, nor that she had any interest in shopping there. The court relied on the fact that the only definitive time in which plaintiff alleged she visited the shopping center was to point out to others the physical barriers that existed, in preparation for this lawsuit. Plaintiff therefore could not demonstrate a likelihood of future injury, and lacked standing to sue under Title III.

In ***Norkunas v. Wynn Las Vegas*****, 2009 WL 2610794 (9th Cir. Aug. 26, 2009),** a professional ADA consultant, two members of a disability rights organization, and a disability rights organization itself sued a hotel for violating Title III's accessibility provisions. The Ninth Circuit affirmed the dismissal of the case finding that none of the plaintiffs had standing to sue. Although the plaintiffs provided evidence of accessibility barriers they encountered in past visits, they provided no information that indicated that any of them planned to return to the hotel at a future date. Because the plaintiffs did not present evidence that they would personally suffer future injury of the barriers were not remedied, the plaintiffs could not establish standing. The court also noted that the hotel provided evidence of plaintiffs' extensive history of litigating accessibility suits suggesting that the only reason for their visits was to pursue litigation.

In ***Chapman v. Pier 1 Imports,*** **2009 WL 1839011(9th Cir. June 29, 2009),** a wheelchair user sued Pier 1 under Title III for accessibility barriers. A previous Ninth Circuit decision had held that an ADA plaintiff who has encountered or has personal knowledge of at least one barrier related to his or her disability when he or she files a complaint and *who has been deterred from attempting to gain access to the public*

accommodation because of that barrier, has suffered an injury in fact for the purpose of Article III. (*See Doran v. 7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008)) A different panel of the Ninth Circuit sharply narrowed the ability to establish Article III standing by an ADA plaintiff who was not deterred from attempting to gain access to a public accommodation, despite the existence of barriers to accessibility. The court found that because the plaintiff testified at his deposition that he was not deterred from entering a public accommodation with accessibility barriers, he only had standing to challenge the barriers he actually encountered. Specifically, the court found that because he was not deterred from entering, he had not suffered an "injury-in-fact" for purposes of Article III, and thus, he did not have standing to challenge barriers he had not personally encountered, but which were identified in discovery.

3. Cases in Which Plaintiff Was Found to Have Standing

In ***Fiedler v. Ocean Properties, Ltd.,* 2010 WL 450912 (D. Me. Feb. 8, 2010),** plaintiff, an individual who uses a wheelchair, made a reservation at a hotel. When plaintiff called to confirm the accessibility of the room, defendant informed him that a barrier existed to the room's patio, but offered an accommodation. Not satisfied that the offered accommodation would make the room accessible, plaintiff cancelled his reservation, and sued under Title III of the ADA. The district court denied defendant's motion for summary judgment, finding that plaintiff had standing to sue. Despite having never visited the hotel, plaintiff demonstrated enough evidence of actual or imminent harm, as he was deterred from staying at the hotel because of the alleged ADA violation. Furthermore, despite having no concrete plans to go to defendant's hotel in the future once accessible, plaintiff presented sufficient evidence, through an affidavit swearing his intent to stay at the hotel, to raise a factual question regarding whether he faced future harm.

In ***Stevey v. 7-Eleven,* (E.D. Cal. 2009) (**unreported, but available at: ca.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%5CFDCT%5CECA%5C2009%5C20090625_0009566.ECA.htm/qx), a man with quadriplegia experienced barriers when he tried to get to the bathroom in a convenience store located between his favorite lake and his home. After the store did not respond to his complaints, he sued under Title III. The store argued that he did not have standing because he acknowledged that he had no specific plans to return to the store. However, the court did not dismiss the case finding that because he lived relatively close to the store, frequently stopped at convenience stores on his way to the lake, and had specific plans to visit the lake, he risked suffering additional injury and therefore had standing to sue.

In ***Rose v. Cahee*, 2010 WL 2925912 (E.D. Wisc. July 22, 2010)**, the plaintiff, an inmate who was HIV positive, sued a physician, a clinic, and the corporation that owned the clinic under the ADA after the physician refused to perform gallbladder surgery on the plaintiff when he learned of her HIV. The court allowed the plaintiff to move forward with her ADA claim against the physician and the clinic. The defendants argued that the plaintiff could not show a real or immediate threat of discrimination to warrant an injunction because she had since been released from the correctional facility that had referred her to the clinic and moved eighty miles away. The court disagreed finding that

the plaintiff's release and move did not render her Title III suit moot. First, the court found that the plaintiff was under supervised release and could be re-incarcerated at the former facility, which could put her back in the same clinic and before the same physician. Second, there was no evidence that the clinic or physician served inmates of the correctional facility exclusively. They had to provide medical services to the general public and the plaintiff could choose to revisit the clinic to receive treatment from staff familiar with her health history. The court noted that if it granted the injunction, the plaintiff might even prefer to visit the clinic because the staff would be familiar with her health condition and enjoined from discriminating against her because of it.

H. Movie Theater Access

In ***State of Arizona v. Harkins Amusement Enterprises, Inc.,*** **2010 WL 1729606 (9th Cir. Apr. 30, 2010),** the State of Arizona and two individuals with disabilities brought suit under the ADA against a movie theater company for the failure to provide open or closed captioning for people who are deaf or hard of hearing and audio descriptions for people who are blind or have low vision. The lower court granted the defendant's motion to dismiss on the basis that the ADA does not require movie theaters to alter the content of their services. The Ninth Circuit held that because closed captioning and audio descriptions are "auxiliary aids and services," movie theaters may be required to provide these services under the ADA and therefore the district court erred in finding that these services are foreclosed as a matter of law. The court remanded to the district court whether providing these services would be an undue burden or would fundamentally alter the services. The Ninth Circuit, relying on previous Department of Justice regulations, also held that the ADA did not require motive theaters to provide open captioning.

State of Massachusetts and Movie Theaters Reach Agreement

Three movie theater chains (AMC, Regal Entertainment and National Amusements, which operates Showcase Cinema) have entered into an agreement with the State of Massachusetts to provide better access to people with disabilities. The agreement requires each of the chains' theaters in Massachusetts to have at least one accessible auditorium. The agreement also establishes that moviegoers with hearing and vision impairments will have a choice of accessible movies at theaters with 10 or more screens.

The Department of Justice Issues Advance Notice of Proposed Rulemaking on Movie Captioning and Video Description

DOJ is providing advance notice that it is considering whether to propose revising the Title III regulations to require movie theater owners and operators to show movies with closed captions and video description in their theaters at least fifty percent of the time. The purpose of the notice is to discuss how best to frame such a requirement and to determine the costs and benefits of any such requirement.

In this notice, DOJ is asking several key questions: (1) what is the appropriate basis for calculating the number of movies that will be captioned and video described and how should any requirement be phased in; (2) what is the status of any conversion to digital

cinema; (3) what standards and technologies exist or are in development for captioning and video description; (4) what are the costs and benefits of movie captioning and video description; and (5) what impact will such requirements have on small businesses?

DOJ is also soliciting comments on whether movie theater owners and operators should be encouraged to screen movies with open captions, even though DOJ is not considering requiring open captions, as an alternate way to achieve compliance with any regulation, whether certain categories of movie theater owners and operators should be exempt from any regulation, and whether there should be notification and training requirements included in any regulation.