


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 adaconferences@adagreatlakes.org or toll free 877-232-1990 (V/TTY).



1

Webinar Features

- Closed captioning – click  icon (top of screen) or control-F8 and adjust your screen
- Questions - type and submit questions in the Chat Area Text box or press control-M and enter text in the Chat Area
- Please do not use emoticons or hand-raising features during this session

2



Top 10 ADA Cases of 2010

Presented by:

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

Valuable assistance was provided by Staff Attorney Lauren Lowe

January 19, 2011



Overview



- **Title I**

- ❖ *Horgan v. Simmons*
- ❖ *Harrison v. Benchmark Electronics Hushtsville, Inc.*
- ❖ *Lowe v. Independent School District No. 1*
- ❖ *Livingston v. Fred Meyer Stores*
- ❖ *Gratzl v. Office of the Chief Judges*
- ❖ *Serwatka v. Rockwell*

- **Title II**

- ❖ *Frame v. Arlington*
- ❖ *Williams v. Quinn*

- **Title III**

- ❖ *State of Arizona v. Harkins Amusement Enterprises, Inc.*
- ❖ *Doe v. Deer*

Continuing Legal Education Credit for Illinois Attorneys



- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- This slide will be repeated at the end.

Top 10 ADA Cases for 2010

Title I Cases

Horgan v. Simmons
Harrison v. Benchmark Electronics Husntsville, Inc.
Lowe v. Independent School District No. 1
Livingston v. Fred Meyer Stores
Gratzl v. Office of the Chief Judges
Serwatka v. Rockwell

Horgan v. Simmons – ADAAA Disability and Medical Inquiries

Horgan v. Simmons, 704 F.Supp.2d 814 (N.D. Ill. April 12, 2010)

- Employee with HIV terminated after disclosing his HIV status.
 - ❖ Supervisor “demanded” to know if there was “something medical going on.”
 - ❖ Employee felt “compelled” to disclose that he was HIV positive.
 - ❖ Said condition was “under control” and did not interfere with job performance – he always exceeded expectations.
 - ❖ Employer questioned how he could perform job “with a terminal illness” and how he could lead once co-workers learned of condition.
- Told employee that he needed “to recover,” should “go on vacation, and leave the plant immediately” – then terminated employment.
- Employee claimed unlawful termination & unlawful medical inquiries.

Horgan v. Simmons – ADAAA Disability and Medical Inquiries

- **Court on Disability:** ADAAA list “functions of the immune system” as major life activities.
 - ❖ Under NPRM, HIV consistently meets the definition of disability.
 - ❖ Disability inquiry “should not demand extensive analysis.”
- **Medical Inquiries:** ADA prohibits inquiries as to the existence or “nature or severity” of a disability unless the inquiry is “job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4).
- Inquiries about employee’s medical condition, his prognosis, and his T-cell count are “prohibited by the ADA.” 42 U.S.C. § 12132.
 - ❖ Employer’s claim they were “entitled to ask questions” after disclosure, was contradicted as employee stated condition did not affect performance.

Horgan v. Simmons & Other 2010 ADAAA Cases



Horgan State Law Claim - Questioning was not a sufficient “prying” into a zone of solitude to establish a claim for invasion of privacy under state law.

- **Note:** States may also have an AIDS/ HIV Confidentiality Act.
- **Note:** Other cases under the ADAAA have been decided similarly.

Hoffman v. Carefirst of Fort Wayne, Inc., 2010 WL 3522573 (N.D. Ind. Aug. 31, 2010)

- Under the ADAAA, cancer that is in remission may be a disability if it would substantially limit major life activity when active – explicitly listed in NPRM.

Gil v. Vortex, 697 F. Supp. 2d 234 (D. Mass. March 25, 2010)

- Employee with monocular vision has a disability under the ADAAA.
 - ❖ Also a “regarded as” claim - adverse action was taken due to the fear of injury.
 - ❖ Noted that the employee likely would not have been successful prior to ADAAA.
- **Query:** Under ADAAA, should all claims except for a failure to accommodate proceed under “regarded as” prong? Please answer “Yes” or “No.”

Harrison v. Benchmark – Standing and Improper Medical Inquiries



Harrison v. Benchmark Electronics Huntsville, Inc.,

593 F.3d 1206 (11th Cir. Jan. 11, 2010)

- Alleged improper medical inquiry of a job applicant. 42 U.S.C. § 12112(d)(2).
 - ❖ Working as contractor, applied for permanent job at supervisor’s request.
 - ❖ Drug test came back positive for barbiturates.
 - ❖ Explained to medical office that he had epilepsy and was prescribed barbiturates with supervisor in the room
 - ❖ Medical office cleared Harrison but supervisor refused to hire claiming attitude & performance problems.
 - ❖ EEOC found no disability and dismissed his claim (pre-ADAAA).

Harrison v. Benchmark – Standing and Improper Medical Inquiries



Issues: 1) Must a job applicant have a disability to challenge the lawfulness of a medical inquiry?

2) What type of inquiry is proper following a positive drug test?

Appellate Court: Reversed grant of summary judgment for employer.

1) Applicants without a disability may challenge improper medical inquiries.

- 42 U.S.C. § 12112(d)(2) refers to a “job applicant,” while other sections refer to “qualified individuals with disabilities.” See 42 U.S.C. § 12112(b)(6).

✦ **Note:** This is the majority view.

- Under liberal federal pleading standards, the medical inquiry may be challenged even though it’s not specifically listed in the complaint.

Harrison v. Benchmark – Standing and Improper Medical Inquiries



- **Court:** Employers can only get limited information when asking applicants about prescription drug use due to drug testing.

- Regulations and EEOC Guidance “make clear that disability-related questions are still prohibited.”

✦ Medical office may have improperly asked about epilepsy & seizures.

✦ Employer may follow-up on positive results to see if a drug is legally prescribed, but cannot ask about an underlying condition.

✦ Supervisor’s presence during the conversation with the medical office may have been an improper attempt to elicit disability information.

Harrison v. Benchmark – Guidance from EEOC Guidance

- **EEOC Enforcement Guidance:** “Employer may ask about lawful drug use or possible explanations for the positive result...”
 - ❖ “What medications have you taken that might have resulted in this positive test result?”
 - ❖ Are you taking this medication under a lawful prescription?”
 - ❖ *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, available at: <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.
 - ❖ **Note:** Under ADA, drug tests are not medical examinations.

Harrison v. Benchmark – Another 2010 Drug Testing Case

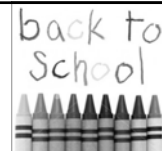
- Bates v. Dura Automotive Systems, Inc.**, 625 F.3d 283 (6th Cir. Nov. 3, 2010)
- Policy against using prescription drugs that may affect safety or performance.
 - ❖ Screened employees for twelve drugs including: Xanax, Lortab, & Oxycodone.
 - ❖ Would not consider Dr. letters stating performance was not affected by the drugs.
 - ❖ Gave each employee an opportunity to “transition to drugs without the prohibited substances,” but the employees refused and were terminated.
 - **Court:** Only a person with a disability can challenge selection criteria under 42 U.S.C. § 12112(b)(6), but not medical inquiries under § 12112(d)(4).
 - ❖ § 12112(b)(6): “qualified individuals with disabilities;” § 12112(d)(4): “employees.”
 - **Query:** Would this case be decided differently under the ADAAA?
Please answer “Yes” or “No.”
 - **Query:** Would the company’s actions hold up to a direct threat analysis?
Please answer “Yes” or “No.”

Lowe v. Independent School Dist. No. 1 Reasonable Accommodation and Constructive Discharge

Lowe v. Independent School District No. 1, 363 Fed.Appx. 548,
2010 WL 258400 (10th Cir. Jan. 25, 2010)

- School planned to reassign counselor with post-polio syndrome who used leg braces to teach in a cramped science lab.
 - ❖ Requested larger room – Response 4 mos. later, 2 wks. before school.
- At meeting school district told teacher: “No accommodations.”
 - ❖ **Superintendent admitted:** Unprepared for meeting, did not review proposed accommodations, and unaware all science classes were labs.
 - ❖ Teacher resigned - failure to accommodate & constructive discharge.

Lowe v. Independent School Dist. No. 1 Reasonable Accommodation and Constructive Discharge



- **District Court Found for Employer:** Teacher resigned before classes started, therefore her anticipated difficulties were speculative.
- **Issue on Summary Judgment (S/J):** Would Lowe have been accommodated “had she not resigned in a huff”?
- **Appellate Court:** Denied Summary Judgment for the employer.
 - ❖ Delay and lack of preparation showed a lack of good faith.
 - ❖ “A question of fact as to whether an employer has failed to interact in good faith... will preclude summary judgment for the employer.”
 - ❖ “Contrary to the district court, we think that ... Ms. Lowe ... could have reasonably concluded that she would be assigned to teach ... in a small and crowded classroom” without accommodations.

Low v. Independent School District #1 – Reasonable Accommodation & Constructive Discharge

- **Court:** School was required to proceed “in a reasonably interactive manner,” once receiving accommodation request.
 - ❖ “Neither party may create or destroy liability by causing a breakdown of the interactive process.”
- **Constructive discharge:** May be shown by a failure to accommodate.
 - ❖ “When an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign.”
 - ❖ “The standard is objective.”

Low v. Independent School District #1 – Concurrence

- **Concurrence:** Liability for “*not making* reasonable accommodations.”
 - ❖ Resignation may have short-circuited the process.
 - ❖ A reasonable accommodation may have been forthcoming as “it is not uncommon to make ... assignment changes shortly before” school starts.
- “... cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process.”
 - ❖ “The interactive process is a means and not an end in itself.”
 - ❖ “Clearly an employer could, with impunity, ignore the interactive process so long as it reasonably accommodated employee needs.”
 - ❖ **Note:** A majority of circuits agree.
- S/J denied as “the record does not supply an answer to that question...”

Lowe v. Independent School District #1 – Other 2010 Reasonable Accommodation Cases

Richardson v. Friendly Ice Cream Corp., 594 F.3d 69 (1st Cir. Feb. 5, 2010)

- **Employee at deposition:** “I needed to be able to do everything.”
- **Court:** No violation for failure to engage in the interactive process unless “there was a reasonable accommodation that would have been discovered.”
 - ❖ “An employer does not concede that a job function is ‘non-essential’ simply by voluntarily” reassigning it as “a temporary accommodation...”
 - ❖ Delegating essential functions is not reasonable.
 - ❖ “We give... substantial weight to the employer’s view of job requirements,” although it is “not dispositive.”

Kiburz v. England, 2010 WL 165139 (3rd Cir. Jan. 19, 2010)

- Working from home was not reasonable as employee would be unable to perform essential job functions of providing technical support, attending meetings and trainings, and achieving effective working relationships.

Lowe v. Independent School District #1 – Other 2010 Reasonable Accommodation Cases

Page v. Liberty Central School District, 2010 WL 176791 (S.D.N.Y. Jan. 7, 2010)

- Telework not a reasonable accommodation for librarian with multiple chemical sensitivity as being physically present was an essential function.

Turner v. The Saloon, Ltd., No., 2010 WL 424580 (7th Cir. Feb. 8, 2010)

- Company does not have to modify its “no nakedness policy” for a waiter with psoriasis who changed clothes in common areas as his underwear became uncomfortable.
- **Query:** Should the teacher in *Lowe* have been required to try the new classroom before resigning? Please answer “Yes” or “No.”

Livingston v. Fred Meyer Stores – Reasonable Accommodation for Commuting

What's on your list today? We'll find it at
Fred Meyer

Livingston v. Fred Meyer Stores, Inc., 388 Fed.Appx. 738, 2010 WL 2853172 (9th Cir. July 21, 2010)

- Plaintiff worked as a wine steward and had a vision impairment that impacted her ability to walk and drive safely after dark.
- Requested and received a modified schedule during fall and winter that minimized her night driving.
 - ❖ Employer removed this accommodation a year later, despite no hardship.
 - ❖ Plaintiff's wine sales actually increased during her modified schedule.
- When Livingston refused to work her scheduled shift, she was fired.
- **Issue:** Did the employer have an obligation to provide a reasonable accommodation for commuting issues related to a disability?

ADA  ONLINE
LEARNING

(877) 232 – 1990 (V/TTY)
<http://www.ada-audio.org>

21

Livingston v. Fred Meyer Stores – Reasonable Accommodation and Commuting

Court: Reversed summary judgment for the employer.

- District Court erroneously held Livingston did not have a disability.
 - ❖ Unlike an “average person,” Livingston's impairment “prevents her from safely driving, walking, or leaving her house alone at night.”
 - ❖ Therefore, she is substantially limited in seeing.
- **Ninth Circuit Rule:** Employers have a “duty to accommodate an employee's [disability-related] limitations in getting to and from work.”
 - ❖ May include making reasonable shift changes as an accommodation.
 - ❖ Vision impairment did not impact her performance at work, but it did affect her ability to finish her shift, triggering a duty to accommodate.
 - ❖ Significant that the employer “had not experienced any hardship.”
 - ❖ Plaintiff's wine sales actually increased during her modified schedule.

ADA  ONLINE
LEARNING

(877) 232 – 1990 (V/TTY)
<http://www.ada-audio.org>

22

Livingston v. Fred Meyer Stores – Reasonable Accommodation and Commuting

- **Court:** Under *Barnett*, a failure to engage in the interactive process in good faith results in employer liability ... when a reasonable accommodation would otherwise have been possible.”
 - ❖ “Fred Meyer Stores denied Livingston's request without providing a meaningful dialogue or explanation of its decision.”
 - ❖ “We disagree with [the district court] that Fred Meyer Stores satisfied its duty to interact in good faith merely by requesting additional information...”
- To prove unlawful discharge, Livingston must initially show that her disability was a “motivating factor” in the termination decision.
 - ❖ Next, Fred Meyer Stores must provide a non-discriminatory reason.
 - ❖ Finally, Livingston must prove the employer's reason was pretextual.

Livingston v. Fred Meyer Stores – Reasonable Accommodation and Commuting

- **Court:** Reversed district court's holding that, “Livingston's refusal to work her scheduled shift was a legitimate reason for firing her” and there was no evidence of pretext.
 - ❖ Livingston's disability prevented her from completing her scheduled shift.
 - ❖ As she was fired for this reason, termination was related to her disability.

See also, *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. April 8, 2010)
- Retail clerk with monocular vision requested a day shift to limit night driving.
 - ❖ **Court:** Accommodations to get to work may be reasonable and required.
- **Note:** Other cases have found no accommodation duty for commuting. **See, e.g., *Parker v. Verizon Pennsylvania, Inc.*, 309 Fed.Appx. 551 (3d Cir. 2009); *Kvoriak v. Maine*, 259 F.3d 48 (1st Cir. 2001).**
- **Query:** Should employers be required to accommodate commuting issues? Please vote “Yes” or “No.”

Gratzl v. Office of the Chief Judges – Reasonable Accommodation, Qualified, and Essential Functions



Gratzl v. Office of the Chief Judges, 601 F.3d 674 (7th Cir. April 7, 2010)

- Court reporter was hired for courthouse control room work.
 - ❖ Job was “ideal” for the employee as she required frequent restroom breaks with short notice due to incontinence issues.
 - ❖ Other court reporters preferred courtroom work.
 - ❖ As a result, supervisors were not aware of her condition for five years.
- Employer restructured its operations, requiring court reporters to rotate among courthouses and courtrooms.
 - ❖ “Court Reporting Specialist” position was eliminated by the State.
 - Consolidated all reporters under the title “Official Court Reporter,” although job duties were not specified.
 - Chief Judge decided that all court reporters would be required to do the same job to evenly distribute the workload.

Gratzl v. Office of the Chief Judges – Reasonable Accommodation, Qualified, and Essential Functions

- Employee requested accommodation of staying in the control room.
- Employer refused but offered several alternatives:
 - ❖ Assignment to juvenile courtrooms where there are no juries.
 - Rejected by employee and Dr. as courtrooms were far from restrooms and there was a lack of flexibility.
 - ❖ Not assigning her to courtrooms where trials were scheduled.
 - Rejected by employee without consulting Dr.
 - ❖ Structure her rotation to include only the courtrooms with an adjacent restroom and setting up a signal whereby she could request breaks.
 - Rejected – claimed would require disclosure of her condition.

Gratzl v. Office of the Chief Judges – Reasonable Accommodation, Qualified, and Essential Functions

- Employee stated only accommodation that would work would be maintaining her prior specialist position without further explanation.
 - ❖ Employment was then terminated.
- **Issue:** Is the employee's request unreasonable as it would require the employer to eliminate an essential job function?
- **Court:** Gratzl is not a qualified individual and she rejected the reasonable accommodation that the court offered.
 - ❖ Change due to legitimate business reasons, not disability animus.
 - ❖ Inability to perform the new, essential functions renders her unqualified.
 - ❖ Employer fulfilled accommodation duty with its proposals.
 - ❖ Employee failed to explain why proposals were inadequate.

Gratzl v. Office of the Chief Judges – Court's Reasoning

- “We presume that an employer's understanding of the essential functions of the job is correct, unless ... plaintiff offers sufficient evidence to the contrary.”
- “Employer may specify ... multiple essential duties...”
- “When an employee is expected to rotate through duties, she must “perform enough of these duties to enable a judgment that she can perform its essential duties.”
- “Indisputable that with the 2006 elimination of specialist positions, in-court reporting became a necessary function.”
- Showing that she was qualified for a “previous job” does not make her qualified for the new job.
- Employee terminated the interactive process.

Gratzl v. Office of the Chief Judges – Court’s Reasoning

- “Her refusal to consider any accommodation [requiring] in-court reporting strongly suggests that she believed she was incapable of performing this function. Therefore, she is not qualified for the job.”
- “An employer is not required to maintain an existing position” that is no longer appropriate based on legitimate reasons.
 - ❖ This is true even though temporary assignments to the control room were allowed for pregnancy or injury recovery.
- The lack of undue hardship relating to the request is not relevant.
 - ❖ “An employer is simply not required to create (or recreate) a new position to accommodate an employee under the ADA, regardless of the amount of hardship involved.”
- **Query:** Should the employee have tried an offered accommodation? Please vote “Yes” or “No.”

Serwatka v. Rockwell Automation – ADA and Mixed Motive Findings



Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. Jan.15, 2010)

- Serwatka alleged she was discharged as she was regarded as being disabled, despite her ability to perform the essential job functions.
- Jury agreed with Serwatka, answering “Yes” on special verdict form:
 - ❖ “Did defendant terminate plaintiff due to its perception that she was substantially limited in her ability to walk or stand?”
- Jury also answered “Yes” to this follow-up question:
 - ❖ “Would defendant have discharged plaintiff if it did not believe she was substantially limited in her ability to walk or stand, but everything else remained the same?”
- **Court:** “The ... pertinent issue is whether the jury's mixed-motive finding entitles Serwatka to judgment in her favor and to the relief.”

Serwatka v. Rockwell Automation – ADA and Mixed Motive Findings

- **Mixed motive:** “When an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations.” *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Gross v. FBL Financial Serv., Inc.*, 557 U.S. ---, 129 S.Ct. 2343 (2009).
- **Price Waterhouse:** An employer may violate Title VII “even if the proscribed criterion was not the sole reason for the ... decision.”
- **Gross Holding:** ADEA does not authorize a mixed motive claim – age must be the “‘but-for’ cause of the employer’s adverse decision.”
- **Seventh Circuit:** *Gross & Price Waterhouse* recognize “the balance that Congress struck between eliminating invidious employment discrimination and preserving an employer’s prerogative to employ whomever it wishes...”

Serwatka v. Rockwell Automation – ADA and Mixed Motive Findings

Congress codified Price Waterhouse when amending the Civil Rights Act but authorized “limited relief” for mixed motive findings:

- “Court may award the plaintiff both declaratory and injunctive relief and attorney’s fees and costs, but may not award damages nor order the plaintiff hired, reinstated to her former position, or promoted.”
- ADA incorporates certain remedies from Title VII for discrimination “on the basis of disability...” including the mixed motive provision with limited relief.
- “In that respect, the ADA is different from the ADEA, which lacks a similar cross-reference.”
- “Yet, although the ADA cross-references the *remedies* set forth in for mixed-motive cases,... it does not cross-reference the provision... which renders employers *liable* for mixed-motive employment decisions.” (Internal citations omitted; emphasis in original).

Serwatka v. Rockwell Automation – ADA and Mixed Motive Findings

- Must show that “his or her employer would not have fired him but for his ... disability; proof of mixed motives will not suffice.”
 - ✦ 7th Circuit previously held mixed motive claims were viable under ADA.
- “Serwatka did not show that her perceived disability was a but-for cause of her discharge,” therefore the jury verdict is overturned.
 - ✦ **Note:** Evidence showed that Rockwell failed to engage in the interactive process in good faith and falsely claimed an economic downsizing was responsible for Serwatka’s termination. *Serwatka v. Rockwell Automation, Inc.*, 2007 WL 2441565, (E.D. Wis. Aug. 23, 2007).
- **Noted by the Court:** ADAAA changed prohibited discrimination to being “**on the basis of** disability” rather than “**because of**” disability. 42 U.S.C. § 12112(a) (2009) (emphasis supplied).
 - ✦ **7th Circuit:** Would not address whether this change would affect its decision.

Serwatka v. Rockwell Automation – Notes and a Query

Notes:

- This is the first post-*Gross* Appellate Court case to address this issue.
- See DBTAC: Great Lakes ADA Center Webinar on Disparate Treatment and Disparate Impact Claims.
- A bill to overturn *Gross v. FBL* was introduced in each house of Congress in 2009 and referred to committee in 2010 - **Protecting Older Workers Against Discrimination Act, H.R. 3721, S. 1756.**
- **Query:** Is a “but-for” cause the same as being the “sole” cause for an employment decision? Please vote “Yes” or “No.”

Top 10 ADA Cases for 2010

Title II Cases

Frame v. Arlington

Williams v. Quinn

Frame v. Arlington – Public Entity Services



Frame v. City of Arlington, 616 F.3d 476 (5th Cir. Aug. 23, 2010)

- **Facts:** Residents who use wheelchairs alleged a failure to make curbs, sidewalks and certain parking lots accessible.
 - ❖ **Procedural History:** Court withdrew a prior decision that the statute of limitations begins when the sidewalks were completed, not encountered.
- **Issue:** Are sidewalks “services, programs or activities” or “facilities”?
 - ❖ **Title II:** No individual with a qualifying disability shall, “by reason of such disability, be excluded from participation in or denied the benefits of” state or city provided “services, programs, or activities.” 42 U.S.C. § 12132.

Frame v. Arlington – Court Decision

- **Court:** “Sidewalks, curbs, and parking lots are not Title II services, programs, or activities” but are part of the infrastructure that provides access to “services programs or activities.”
 - ❖ No private right of action unless noncompliance has denied access to a service, program, or activity.
 - ❖ Statute of limitations is triggered when plaintiff knew or should have known that he or she was excluded from a service, program, or activity.
 - B/P is on the defendant to show noncompliance with the S/L.
 - ❖ Must show that, “considering all of the circumstances, there is an unreasonable level of difficulty in accessing the benefits.”
 - ❖ No private right to enforce regulations regarding transition plans. See ADAAG, 28 C.F.R. § 35.150(d)(1).
 - Cited *Alexander v. Sandoval*, 532 U.S. 275 (2001) - “Private rights of action to enforce federal law” are creatures of congressional intent.

Frame v. Arlington – Court Decision

- **Court:** A word “must be given its ordinary, ‘everyday meaning.’ ”
 - ❖ MERRIAM-WEBSTER'S DICTIONARY definitions for “service” include: “[t]he duties, work, or business performed or discharged by a public official,” and “the provision, organization, or apparatus for ... meeting a general demand.”
- **Court:** “When... a public entity provides or maintains a sidewalk, or its accompanying curbs, or public parking lots, it arguably creates an “apparatus for ... meeting a general demand,” but it does not perform “work ... by a public official.”
 - ❖ “The concept of infrastructure is usually inanimate; this suggests that while infrastructure may aid in the provision of other services, it is not considered a service itself.”

Frame v. Arlington – The Dissent

Judge Prado, concurring in part and dissenting in part:

- In the first (withdrawn decision), a different *Merriam-Webster* definition of service was used: “A facility supplying some public demand.”
- Under either definition, constructing and maintaining sidewalks should be considered a service of a public entity.
- “In a show of impressive solidarity, our sister circuits have consistently held that coverage under ‘services, programs, and activities’ is unambiguous and should be broadly construed.”
- The majority's opinion dismisses the work of our sister circuits in a footnote, disregarding their interpretation of the ADA and asserting that they considered the issue “without thorough analysis.”
- “The majority's opinion offers no caselaw to support its new analysis.”

Frame v. Arlington – The Dissent

Judge Prado, concurring in part and dissenting in part:

- “Given the clear intent of Congress described above, this dearth of precedent is troubling.”
- “...I think that the majority opinion's approach asks the wrong question. It is not the sidewalks themselves that we should concern ourselves with; it is the construction, modification, or alteration of sidewalks that is the ‘service.’”
- “Arlington built sidewalks. Arlington maintains sidewalks. And, when it deems it appropriate, Arlington alters the sidewalks. Each of these acts is a normal function of government. The acts taken by Arlington with regard to its sidewalks fall within the unambiguous meaning of “services, programs, and activities.” I respectfully dissent.”
- **Query:** Do you agree with the majority? Please vote “Yes” or “No.”

Frame v. Arlington – Other Cases Interpreting Public Services

- **NOTE:** The decision acknowledges that it is contrary to all other Circuit Courts of Appeals decisions that have used a broader interpretation.

Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002), *Certiorari Denied*, *City of Sacramento, Cal. v. Barden*, 539 U.S. 958 (June 27, 2003).

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.” Similarly, **Yeskey v. Commonwealth of Penn. DOC**, 118 F.3d 168 (3rd Cir. 1997)

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.

Williams v. Quinn – Community Integration and Olmstead



Williams v. Quinn, --- F.Supp.2d ----, 2010 WL 3894350,
05 C 4673 (N.D. Ill. September 29, 2010)

- Class action on behalf individuals with mental illness living in large private state-funded facilities known as Institutions for Mental Disease (IMDs).
- Consent Decree was entered by Judge Hart on 9/29/10
- Over 5 year period, all IMD residents who desire community placement shall transition to the most integrated community-based setting (approx. 4500 people).
- Illinois will get federal money to support new community services (IMDs are 100% state funded).

Williams v. Quinn – Community Integration and Olmstead

- Significant because it makes clear that ADA/*Olmstead* applies to privately owned facilities that receive state funding.
 - ❖ Many states utilize privately owned facilities to house people with disabilities.
- Significant because a similar agreement on behalf of people with developmental disabilities was rejected by a judge in Illinois the year before.

Williams v. Quinn – Other Community Integration Cases



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

This case is on appeal and has a very similar fact pattern as *Williams*.

District Court: NY does not have an “Olmstead” plan. 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:

- 1) Time frame or target date for placement in a more integrated setting
- 2) Approximate number of people 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.

Williams v. Quinn – Other Community Integration Cases

Knowles v. Horn, 2010 WL 517591 (N.D.Tex. February 10, 2010)
(Case is currently on appeal)

- Person with multiple disabilities received in-home services and required 24/7 care.
- Agencies decided to send him to institution because the cost of his care exceeded annual limit and he sued under Title II – “at risk” of institutionalization.
- District court granted summary judgment to the individual and awarded permanent injunction requiring agencies to maintain home based services.
- Evidence showed that institutions could not keep the individual alive.
- The one institution willing to admit him had very low ratings.
- Therefore, his medical needs could not be met in institution.
- **Court:** Bringing in additional funds to maintain home services through a legislative rider would not be a fundamental alteration.

Top 10 ADA Cases for 2010

Title III Cases

*State of Arizona v. Harkins Amusement
Enterprises, Inc.*

Doe v. Deer

Arizona v. Harkins Amusement — Auxiliary Aids and Theater Access



State of Arizona v. Harkins Amusement Enterprises, Inc., 603 F.3d 666 (9th Cir. Apr. 30, 2010)

- **Facts:** Suit alleges a movie theater company failed to provide:
 1. Open or closed captioning for people who are deaf or hard of hearing; &
 2. Audio (video) descriptions for people who are blind or have low vision.
- **Issue:** Is providing open or closed captioning or audio descriptions a required “auxiliary aid [or] service” or a fundamental alteration or undue burden?
- **District Court:** Granted defendant’s motion to dismiss - the ADA does not require movie theaters to alter the content of their services.

Arizona v. Harkins — Auxiliary Aids and Theater Access



- **Ninth Circuit:** Closed captioning and audio descriptions are “auxiliary aids and services” that may be required absent undue burden or fundamental alteration.
 - ❖ Based on comments in DOJ Regulations, open captioning is not required.
- A brand of seat-based closed captioning is Rear Window Captioning.
 - ❖ Patrons use portable, clear reflector panels that make the captions appear superimposed on or beneath the movie screen.
 - ❖ Major movie studios distribute a significant number of wide-release movies with captions for use with Rear Window Captioning and open caption projection systems.
 - ❖ Theaters must have equipment for Rear Window Captioning or open caption projection systems.

Arizona v. Harkins — Auxiliary Aids and Theater Access



- Descriptive narration, (a/k/a audio description), is used for people who are blind or have visual impairments.
 - ❖ Enables people to hear information about key visual aspects of a movie through descriptions of scenery, facial expressions, costumes, action settings, and scene changes during natural pauses in dialogue transmitted via a headset.
 - ❖ Major movie studios distribute wide-release movies with descriptive narration capability, but accessibility to this service is limited to theaters that have equipment for audio descriptions.

Arizona v. Harkins — Court's Analysis



Court's Analysis – The ADA:

- Discrimination includes a failure to provide auxiliary aids and services, absent fundamental alteration or undue burden.
42 U.S.C. § 12182(b)(2)(A)(iii).
- “Auxiliary aids and services” includes:
 - (A) qualified interpreters or **other effective methods** of making aurally delivered materials available to individuals with hearing impairments;
 - (B) qualified readers, taped texts, or **other effective methods** of making visually delivered materials available to individuals with visual impairments;
 - (C) acquisition or modification of equipment or devices; and
 - (D) other similar services and actions. (emphasis added).42 U.S.C. § 12103(1).

Arizona v. Harkins – Court's Holding

Court's Holding: “Movie captioning and audio descriptions clearly are auxiliary aids and services.”

- They are “effective methods of making [aurally or visually] delivered materials available to individuals with [hearing and visual] impairments.” 42 U.S.C. § 12103(1)(A)-(B); 28 C.F.R. § 36.303(b)(1).
- “Indeed, ‘open and closed captioning’ and ‘audio recordings’ are listed as examples of auxiliary aids and services in the regulations.
- District court's reasoning that this would constitute a different service effectively eliminates the duty to provide auxiliary aids and services.
- “By its very definition, an auxiliary aid or service is an additional and different service that establishments must offer...”

Arizona v. Harkins – Court's Holding

Court's Holding: Open captioning is not required under the ADA.

- DOJ's Preamble to Regulations “plainly states that ‘[m]ovie theaters are not required by § 36.303 to present open-captioned films.’” 28 C.F.R. pt. 36, App. B(C), at 727 (2009).
 - ❖ Although the DOJ's preamble “appears to conflict with 28 C.F.R. § 36.303(b)(1)'s inclusion of open captioning as an example of ‘auxiliary aids and services,’ the commentary is nonetheless entitled to deference in this case. (footnote 2).
- **Note:** DOJ is accepting comments on open and closed captioning in connection with possibly revising regulations until 1/24/11. DOJ ANPRM at: <http://www.regulations.gov/#!documentDetail;D=DOJ-CRT-2010-0007-0001>.
- **Note:** See prior DBTAC: Great Lakes ADA Center Webinar on Title III for more information on movie theater access.

Arizona v. Harkins – More Information on Movie Theater Access

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 improve access for people with disabilities.
- Each of the chains' theaters in Massachusetts to have at least one accessible auditorium and moviegoers with hearing and vision impairments will have a choice of accessible movies at theaters with 10 or more screens.

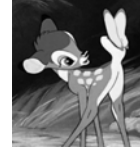
Doe v. Deer – Public Accommodations and Direct Threat



Doe v. Deer Mountain Day Camp, 682 F.Supp.2d 324 (S.D.N.Y. Jan. 13, 2010)

- 10 year-old boy living with HIV was denied admission to a basketball camp.
- **Camp:** Insufficient time to investigate whether applicant posed a direct threat and claimed they were unable to provide separate pool and toilet facilities (undue burden).
 - ✦ Claimed decision was based on a camp nurse's conversation with a Dr. who knew the boy, but did not treat him for HIV.
- **Court:** Decision was based on boy's HIV status only and camp failed to show his participation posed a significant risk of substantial harm.
 - ✦ "Defendants failed to present any evidence of the objective reasonableness of their determination that Plaintiff's condition posed a threat to other campers."
 - ✦ Camp based decision on fear and stereotypes based on boy's HIV status.
 - ✦ Nurse's good faith belief of threat was insufficient, as decisions on direct threat must be based on objective medical evidence.

Doe v. Deer — Public Accommodations and Direct Threat



Camp's Investigation of the Risk

- At first, Nurse Gloskin responded that the camp had others with medical conditions and it was not a problem.
- Nurses spoke with Adam's Dr. and claimed that he told them that there could be "some sort of transmission issue,' due to blood in his stool or urine, and recommended ... a separate pool and bathroom."
 - ✦ Dr. Levy claimed he told them the "risk of transmission ... was extremely unlikely"
 - ✦ Did not recommend a separate pool or toilet
 - ✦ Only small risks from contact sports – minimized with universal precautions
- Nurse Gloskin believed that generally, "HIV is not transmissible in a swimming pool so long that the pool is properly clean and chlorinated."
- "According to Gloskin, it is possible to transmit HIV on a toilet."
- Nurses "did not do any background research specifically on HIV."

Doe v. Deer — Public Accommodations and Direct Threat

Direct Threat Defense

- Participation is not required when an individual poses a "direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3)
- "The focus is on the objective reasonableness of Defendants' assessment."
- Court does not "independently assess whether [Plaintiff] posed a direct threat."
- Court "determines the reasonableness of Defendants' actions ..."
- "In the absence of objective medical evidence to the contrary," the fact-finder utilizes the "views of the CDC/PHS/NIH and similar medical authorities."
- **Note:** There were also issues about doctor/patient confidentiality and conflict of interest.

Doe v. Deer — Public Accommodations and Direct Threat

- **Direct Threat:** “A significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”
 - ◊ “The probability of significant harm must be substantial, constituting more than a remote or slightly increased risk.” (“The purported risk must be substantial, not speculative or remote.”) 28 C.F.R. § 36.208(b).
 - ◊ Camp must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. 28 C.F.R. § 36.208(c).
- “Defendants ... have not presented the court with evidence of the objective reasonableness of their direct threat determination sufficient to survive summary judgment.”

Doe v. Deer — Public Accommodations and Direct Threat



- A plaintiff like Adam is “not required to prove that he poses no risk.”
- “To survive summary judgment, Defendants have the responsibility to present the court with objective, medical evidence—such as reliable medical guidelines, literature, or expert testimony—to establish that their direct threat assessment was reasonable.”
- “Defendants ... have provided ... no objective, medical evidence to support their threat determination.”
- **Public Health Authorities:** “HIV cannot survive outside the body” (including pools and toilet seats).
 - ◊ Must provide a “credible scientific basis for deviating from the accepted norm.”
- A public accommodation “cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions.”
- **Note:** Direct threat to self is not a listed defense in Title III text or DOJ Regs.

Doe v. Deer – Other 2010 Direct Threat Cases

EEOC v. Hussey Copper Ltd., 696 F.Supp.2d 505 (W.D. Pa. March 12, 2010)

- Direct threat case involving applicant who received methadone treatment
- Court found that employer failed to do individualized assessment
- Responses to methadone are individualized and company physician did not do neurological exam of applicant or contact applicant's providers

Mayes v. Whitlock Packaging Corp., 2010 WL 1754200 (E.D. Okla. Apr. 29, 2010)

- Plaintiff with epilepsy that could not be controlled with medication posed a direct threat.
- Had fifteen seizures within a few months of employment some with injuries to herself and co-workers.
- Terminated for biting a coworker during a seizure.
- Individualized assessment does not require an independent medical examination.
- Plaintiff could become physically aggressive during a seizure.
- Unreasonable to require co-workers to avoid plaintiff during a seizure.

Doe v. Deer – Other 2010 Direct Threat Cases

Wurzel v. Whirlpool Corp., 2010 WL 1495197 (N.D. Ohio Apr. 14, 2010)

- Materials handler had a heart condition meaning he could not drive company vehicles necessitating reassignment.
- His physician cleared him but was not told of the frequency or severity of his artery spasms.
- **Court:** Granted summary judgment to the employer.
- **Duration of the risk:** Is not the duration of any particular episode, but rather the “longevity of the underlying condition.”
- **Likelihood of potential harm:** “Likelihood is not the same as certainty - employers need not wait for harm to occur to take action.
- **Imminence of potential harm:** Spasms were sufficiently likely to occur to satisfy the imminence factor.

General ADA Resources



- **National Network of ADA Centers:** www.adata.org; 800/949 -4232(V/TTY)
- **Equal Employment Opportunity Commission (EEOC):** www.eeoc.gov
- **Department of Justice –** www.ada.gov; 800/514-0301 (V); 800/514-0383 (TTY)
- **Equip For Equality:** www.equipforequality.org; 800/537-2632 (Voice); 800/610-2779 (TTY)
- **Job Accommodation Network:** <http://askjan.org>

Continuing Legal Education Credit for Illinois Attorneys



- **This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys**
- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org**

Thank you for Participating In Today's Session:

Top 10 ADA Cases for 2010

Next Legal Webinar is March 16, 2011

***Post Secondary Education and
Licensing Under the ADA***



63

Final Comments

- Thank you Alan and Barry
- An Archived Recording of this session will be available within 2 business days at:
www.ada-audio.org/Archives/ADALegal/
- An email with the link for today's session evaluation will be sent to you following this session – Please complete the survey as we value your feedback

64

Top 10 ADA Cases for 2010

The End

Presented by:

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

January 19, 2011

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 of Rehabilitation and
Research Award No. H133A060097.

