ADA Online Learning

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Requirements and Barriers When Bringing Suit Under the ADA

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- **This slide will be repeated at the end.**

Overview

- **Covered Employers**
- **Covered Employees**
- **Standing**
- **Filing Timelines**
- **Exhaustion of Administrative Remedies**
- **Practical Tips**

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Requirements and Barriers When Bringing Suit Under the ADA

Employer and Employee Coverage

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Employers Covered by the ADA

Possible Barrier:

Employer is not covered by the ADA which covers:

- Employers with "15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."
  - All state and local government employees are covered.
  - State or local laws may cover employers with 1+ employees.
- Federal agencies are covered by the Rehabilitation Act.
  - Organizations that receive federal financial assistance may be covered under both the ADA and the Rehab Act.

Clackamas – Counting Issues

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

- **Facts:** Employee filed ADA suit against a professional medical corp.
  - Physician/shareholders claimed they were not employees.
  - Therefore, they claimed the ADA did not apply as there were less than15 employees.
- **Issue:** Are the 4 physician/shareholders who own a professional corp. also counted as employees in determining the # of employees?
- **Holding:** Maybe. A designation as "partner" does not end the analysis. Look at common law criteria for master-servant relationships.

Common Law Criteria for Master / Servant Relationships

1) Degree of control – hiring, firing, supervision
2) Extent of the organization's supervision of the individual's work
3) Does the individual report to someone higher in the organization?
4) Individual's influence in the organization
5) Intent of the parties as expressed in written agreements or contracts
6) Whether the individual share in the profits, losses, and liabilities?

Court: Although "[n]o one of these factors is determinative . . . the common-law element of control is the principal guidepost …"

See also, Nationwide Mutual Ins. Co. v. Darden, 302 U.S. 318 (1992); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 371-372 (2d Cir. 2006); EEOC Compliance Manual § 605:0009; Restatement of Torts

Other Factors Indicating Employment Status

- **Other factors may include:**
  - Whether the work requires a high level of skill or expertise.
  - Whether the employer furnishes the tools, materials, & equipment.
  - Whether the employer has the right to control when, where, and how the worker performs the job.

EEOC Compliance Manual § 605:0008

Clackamas – Are They or Aren't They?

- **Some facts in *Clackamas* indicate that the physicians / shareholders / directors are not employees as they:**
  - Control the operation of their clinic
  - Share the profits
  - Are personally liable for malpractice claims.

Clackamas – On the Other Hand

- **On the other hand, the physicians / shareholders / directors…**
  - Receive salaries
  - Must comply with the clinic standards & report to personnel manager
  - Admit they are "employees" under ERISA (prime reason for being a P.C.) and state worker's compensation laws.
  - Have employment contracts
  - Can be terminated

Clackamas – The Dissent

- **Court's Holding:** Remanded to the appellate court as physicians may be employees based on the district court's findings and common law master/servant criteria.
- **Justice Ginsburg's Dissent:**
  - Would affirm Cir. Ct. holding that Drs. are employees
  - "I see no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscrimination statutes."

Clackamas – Subsequent Cases

- Having managerial or supervisory authority does not necessarily mean someone is not an employee.
  See Smith v. Castaways Family Diner, 453 F.3d 971 (7th Cir. 2006); *De Jesus v. LTT Card Servs*., 474 F.3d 16 (1st Cir. 2007).
- Boards of directors will usually not qualify as employees under *Clackamas*.
  See Fichman v. Media Ctr., 512 F.3d 1157 (9th Cir. 2008).
- Access to employer's assets/profits instead of a traditional salary-based compensation is strong evidence against employee status.
  See Steelman v. Hirsch, 473 F.3d 124 (4th Cir. 2007).

Clackamas – Subsequent Cases

- NY state education department was not an employer of teachers because the board of education had the hiring/firing power and did not delegate control to the state education department.
  See Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361 (2d Cir. 2006)
- Professional associations, such as a pilots' association, that act as gatekeepers for employment do not constitute employees provided that they do not exercise the elements of employer control over members.
  *See Coleman v. New Orleans & Baton Rouge S.S. Pilots' Ass'*n, 437 F.3d 471 (5th Cir. 2006) (ADEA case applying *Clackamas* factors).

Employment Status – *Walters*

EEOC & Walters v. Metropolitan Educational Enterprises., Inc.,
519 U.S. 202, 117 S. Ct. 660 (1997)

- **Issue:** How is one an employee? Let us count the days.
- **Court:** "An employer 'has' an employee if he maintains an employment relationship with that individual" on the day in question, regardless of whether employee worked or was compensated on given day.
  - "Employment relationship" is the "touchstone."
  - Was there an "employment relationship with 15 or more individuals for each working day in 20 or more weeks during the year…?"
  - Use "payroll method": # individuals on employer's payroll per week
  - "For example, an employee who works irregular hours,… only a few days a month, will be counted… for every week in the month."

Counting Issues – *Walters*

- **Court:** "All one needs to know about a given employee for a given year is whether the employee started or ended employment during the year and, if so, when. He is counted as an employee for each working day after arrival and before departure."
- **Note:** *Walters* has been applied to ADA Cases.
  See, e.g., Fichman v. Media Center, 512 F.3d 1157 (9th Cir. 2008) (an employer's payroll is evidence of employment relationships); *Hosler v. Greene*, 173 F.3d 844 (2d Cir. 1999) (unpublished). *See also, EEOC Enforcement Guidance on EEOC & Walters v. Metropolitan.*
- **Query:** Does *Walters* give a reasonable meaning to the phrase "each working day"? **Please Answer "Yes" or" No"**

Protected Individuals

Possible Barrier:

Employee does not meet the ADA definition of disability:

- A physical or mental impairment that causes a substantial limitation of one or more major life activities.
- Also covered are individuals with a "record of" a disability or who are "regarded as" having a disability.

42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)

Note: As the ADAAA broadened the definition of disability, it is anticipated that this defense will be less effective for cases arising after the ADAAA effective date of January 1, 2009.

Independent Contractors Under Title I

Possible Barrier:

Individual was an independent contractor, not an "employee."

- Courts generally find independent contractors are not covered by Title I of the ADA.
  - Look at common law factors of master/servant relationship.
- **Note:** ADA Retaliation cases arise under Title V, therefore an employment relationship is not required.
- **Note:** Title III or the Rehab Act may provide coverage for denial of the "full and equal enjoyment of the goods, services,… [or] privileges,… of any place of public accommodation."

Independent Contractors Under Title I

Aberman v. J. Abouchar & Sons, Inc.,
160 F.3d 1148 (7th Cir. 1998)

- Sales worker was "independent contractor" rather than "employee" of manufacturer, thus not protected by ADA.
  - Made sales calls for other companies
  - Incurred significant costs
  - Tax returns listed earnings as business income, not wages
  - No evidence position was permanent.

Independent Contractors Under Title III – a/k/a *Jack & Arnie v. Casey Martin*

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

- Golfer sought to use a golf cart in PGA tournaments.
- **Issue:** Does Title III cover golf tournament participation?
- **Holding:** Participating in golf tournaments is a benefit & privilege under Title III - reasonable modifications of policies may be required.
  - Definition of public accommodations should be liberally construed.
  - Title III is not limited to customers but even if it were, Casey Martin is a "customer" of the "competition."
  - Using a golf cart would not fundamentally alter the nature of tournament golf (none of golf's several hundred rules concern walking).
- **Scalia Dissent:** Title III applies only to customers, not contractors.

Independent Contractors Under Title III

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

- "Title I does not protect independent contractors."
- "A medical doctor with staff privileges… may assert a cause of action under Title III…"

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

- A physician with privileges had standing under Title III and 504, but he posed a direct threat and was not "qualified."

Independent Contractors Under Title III

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

- Rejected *Menkowitz* in finding that Title III should only apply to "customers" and not to a Dr. who was an independent contractor.
- "While the ADA protects 'employees,' the Act does not protect independent contractors."
- Cited Scalia's dissent in *PGA v. Martin* for this position.
- **Query:** Is it proper to follow a dissent in a Supreme Court decision? **Please answer** "Yes or No"

Independent Contractors Under Section 504 of the Rehab Act

Fleming v. Yuma Regional Medical Center, 2009 WL 3856926 (9th Cir. November 19, 2009)

- Anesthesiologist's employment contract was terminated after the practice learned he had sickle cell anemia.
  - Obviously discrimination, but was it unlawful?
- **Court:** § 504 covers independent contractors
  - Incorporates only substantive standards of Title I regarding conduct
  - No limitations on covered employers, a jurisdictional requirement.
- Agrees with 10th Circuit; Conflicts with 6th and 8th Circuits.
- Rejects position in Scalia dissent in *PGA v. Martin.*

Independent Contractors in Other Professions

Note: A worker's status is frequently litigated due to the gap in anti-discrimination protection for independent contractors.

Some cases examining the independent contractor issue:

- **Surgeon** with staff privileges at a hospital (previously discussed).
  - **Is covered**: *Menkowitz v. Pottstown Mem'l Med. Ctr.,* 154 F. 3d 113 (3rd Cir. 1998); *Haas v. WY Valley Health Care,* 553 F.Supp.2d 390 (MD PA 2008.)
  - **Is not covered**: *Wojewski v. Rapid City Regional Hosp., Inc*., 450 F.3d 338, 342 (8th Cir. 2006).
- **Anesthesiologist**. *Chadha v. Hardin Memorial Hospital*, 202 F.3d 267 (6th Cir. 2000) (Could not show that he was qualified for the job); *Fleming v. Yuma Regional Medical Center*, 2009 WL 3856926 (9th Cir. November 19, 2009) (Covered under the Rehabilitation Act).

Independent Contractors in Other Professions

- **Physical therapist**. *Lee v. Glessing*, 2006 WL 2524185 (N.D.N.Y., August 30, 2006)(Independent contractors are not covered under Title VII).
- **Musician**. *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486 (8th Cir. 2003)(Independent contractors are not covered under Title VII).
- **Auctioneer**. *Case v. ADT Automotive, Inc*., 163 F.3d 601 (8th Cir.1998)(Independent contractors are not covered under ADA or Missouri law).

Independent Contractors in Other Professions

- **Insurance agent**. *Birchem v. Knights of Columbus*, 116 F.3d 310 (8th Cir. 1997)(Independent contractors are not covered under ADA or North Dakota law although insurance agent may have been an employee of another insurance agent.)
- **Manufacturer's sales representative**. *Dykes v. DePuy, Inc*., 140 F.3d 31 (1st Cir. 1998)(Independent contractors are not covered under ADA or Massachusetts law).
- **Verifier for a telemarketing firm**. *D'Agostino v. Ver-A-Fast Corp*., 110 F. App'x 681, 2004 WL 2300092 (6th Cir. 2004) (Independent contractors are not covered under ADA).

Volunteers – Thanks, but No Thanks

Possible Barrier:
The individual was a volunteer and not an employee.

From EEOC Policy Guidance Manual:
http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-c

- Volunteers usually are not protected employees unless…
- "S/he receives benefits, - pension, life insurance, workers' compensation, or access to professional certification."
- Benefits must be a "significant remuneration," not "inconsequential incidents of an otherwise gratuitous relationship."
- Volunteers may also be covered if volunteer work is required for, or regularly leads to, regular employment with the entity.

Volunteers – Thanks, but No Thanks

Bauer v. Muscular Dystrophy Ass'n, 427 F.3d 1326 (10th Cir. 2005).

- **MDA policy:** Volunteers must be able to lift and care for campers.
  - Volunteers with muscular dystrophy could not meet the requirement – therefore they were not qualified.
- **Court:** The right of equal access under Title III "is most reasonably construed to mean the goods, services and facilities offered to customers or patrons, not to paid employees, independent contractors, or unpaid volunteers."
  - Relied on Scalia's dissent in *PGA v. Martin.*
  - Used a Title I, essential function analysis.

Volunteers Continued

Bauer v. MDA*,* 268 F. Supp 2d. 1281 (D. Kan. 2003)

- **Court:** "While this is not a case brought under Title I of the ADA, reference to case law from the employment context is appropriate in this case because "the nature of [the] goods, services, facilities, privileges, advantages or accommodations" provided at Camp Chihowa necessitated that volunteers act in a capacity at least somewhat analogously to that of an employee.
- **Note:** Court cited only one Title III case in its decision.

Haavistola v. Cm'ty Fire Co. of Rising Sun, 6 F.3d 211 (4th Cir. 1993)

- A volunteer firefighter may be covered under Title VII of the Civil Rights Act if s/he received sufficient other benefits such as a disability pension, survivors' benefits, and tuition reimbursement.

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Recent Litigation on the ADA and Standing to Sue

Standing

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Standing - Overview

General Standing Requirements:

- Plaintiff must suffer a personalized and concrete injury-in-fact of a legally cognizable interest
- The injury must be traceable to the defendant's conduct
- It must be likely, rather than speculative, that the injury is redressable through a favorable court decision

Title III Standing Requirements

- Plaintiff must show harm from lack of ADA compliance
- Accessibility issues must relate the plaintiff's disability
- Must show a likelihood of future harm
- Plaintiff must not be a "vexatious" or "frivolous" litigant

Standing to Sue – Allegation of Future Harm

- Four factors adopted by many courts for demonstrating likelihood of future harm:
  - Proximity of the business to the plaintiff's home,
  - Plaintiff's past patronage of the defendant's business,
  - Definiteness of the plaintiff's plans to return, and
  - Frequency of travel near the business.

  See, e.g., Access 4 All, Inc. v. Wintergreen Commercial, 2005 WL 2989307 (N.D. Tex. Nov. 7, 2005).
- This approach has been criticized by courts & commentators. *See, e.g., Doran v. 7-Eleven,* 524 F.3d 1034 (9th Cir. 2008); Ruth Colker, *ADA Title III: A Fragile Compromise, 21 Berkeley J. Emp. & Lab. L. 377* (2000).

Pending Bill – ADA Notification Act of 2011

- Would require plaintiff to give a Title III entity written notice of an alleged violation before filing suit.
- Would allow the entity 90 days to correct alleged violations before a Title III law suit could be filed.
  - Bill is a reaction to aggressive ADA Plaintiffs
- **Current Status:** Referred to committee
- **More Info on H.R. 881 at:** http://www.govtrack.us/congress/bill.xpd?bill=h112-881
- **Note:** Courts have rejected arguments that pre-litigation notice is currently required under Title III. *See, e.g., Molski v. Evergreen Dynasty Corp.,* 2007 WL 2458547 (9th Cir. 2007).

Standing to Sue – Cases Where Plaintiff Did Not Have Standing

Harty v. Simon Prop. Group, L.P.,
2010 WL 5065982 (S.D.N.Y. Dec. 7. 2010)

- Title III case against an inaccessible mall by a wheelchair user.
- **Complaint: "**Plaintiff has visited the property … and plans to return to the property to avail himself of the goods and services …, and to determine whether the property has been made ADA compliant..."
  - Plaintiff is also an ADA compliance tester.
- **Affidavit:** Plaintiff is "a licensed private detective" who travels around the country to attend gun shows, is a former resident of NY, "returns to the area quite often to visit family…," and "would like to shop at Nanuet Mall again…"
- **Court:** No standing to sue as the plan to return was too vague.

Standing to Sue – Plaintiff Did Not Have Standing

Brown v. Grandmother's Inc.,

2010 WL 611002 (D. Neb. Feb. 17, 2010)

- Title III suit by a person who uses a wheelchair against a restaurant for inaccessibility.
  - Lives 102 miles from the restaurant, passed it many times, and was unable to enter due to an inaccessible ramp.
  - Companions entered and noted other ADA violations.
  - Plaintiff is an ADA tester.

Court: Plaintiff failed to establish definite plans to return.

- An injury-in-fact is a harm that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."
- Threat of injury must be both real and immediate.

Brown v. Grandmother's – Continued

- "Although plaintiffs need not engage in the "futile gesture" of visiting a building containing known barriers …, they must at least prove knowledge of the barriers and that they would visit the building in the imminent future but for those barriers."
- "Although a single act of past discrimination may be sufficient to establish standing to bring an action under the ADA, plaintiffs 'who seek injunctive relief must ... demonstrate that they themselves face a real and immediate threat of future harm."
- No history of patronizing Grandmother's Restaurant.
- No specific immediate or definite plans to return.
  - Intent to return to the place of injury "some day" is insufficient.

Standing to Sue – Again, No Standing for Ms. *Brown*

Brown v. Grand Island Mall Holdings, Ltd.,
2010 WL 489531 (D. Neb. Feb. 8, 2010)

- Same Plaintiff as prior case – she is a resident of Grand Island.
- Title III case against a mall was dismissed because plaintiff did not provide a sworn affidavit indicating she had patronized the mall in the past and had a definite plan to return in the future.
- Brown stated she is familiar with the alleged barriers and has encountered architectural barriers at the shopping center "over the past several years."
- Grand Island Mall argues she lacks standing because there is only evidence of a single visit, which was made over a year ago in preparation for this lawsuit.

Standing to Sue – *Brown*

- "A presumption against future injury applies unless Brown can show a connection to the establishment."
- Other cases filed by Brown may be relevant if credibility was at issue, but court said it would not examine her credibility.
- Yet, the court said, "Brown alleges [that she] also intends to visit the premises annually to verify ADA compliance, … but there is no presumptive truthfulness to this allegation."
- *See also*, *Steger v. Franco, Inc. (8th Cir., 2000), 228 F.3d* 889; *Pickern v. Holiday Quality Foods Inc. (9th Cir., 2002), 293 F.3d 1133; Ault v. Walt Disney World Co*., 2008 WL 490581 (Feb. 20, 2008).
- *See also*, Great Lakes ADA Center Brief, "Hot Topics in Title III Litigation" www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo11_Title3Litigation.pdf

Standing to Sue – Cases Where Plaintiff Had Standing

Betancourt v. Federated Department Stores,
2010 WL 3199617 (W.D. Tex Aug. 10, 2010)

- **Background:** Wheelchair user alleged that Macy's violated Title III because of narrow spaces between displays and high counters.
- **Court:** Rejected Macy's claim that plaintiff did not have standing and criticized other court's narrow interpretation of standing.
- **Standard for demonstrating future harm:** "The risk of injury in fact is not speculative so long as the alleged discriminatory barriers remain in place, the plaintiff remains disabled, and the plaintiff is "able and ready" to visit the facility once it is made compliant…"
- "A disabled plaintiff who alleges that she is currently being deterred from visiting a public accommodation that is violating Title III alleges sufficient present injury in fact for prospective equitable relief."
  - ADA Tester status does "not change the analysis or outcome."

Standing to Sue – Cases Where Plaintiff Had Standing

Abercrombie & Fitch TRADEMARK SINCE 1892

Equal Rights Ctr. v. Abercrombie & Fitch Co.,
2010 WL 4923300 (D. Md. Nov. 29, 2010)

- **Background:** an individual shopper and an advocacy group filed suit against a retailer for inaccessibility.
- **Individual standing:** Plaintiff's statement that she would continue to shop at Abercrombie as long as her daughter was interested in the clothing was sufficient.
- **Associational standing:** Sufficient allegations that the organization's members had suffered harm at various locations of Abercrombie that they visited, but not at locations they had not visited.

Standing to Sue – Cases Where Plaintiff Had Standing

Chapman v. Pier 1 Imports, 2011 WL 43709 (9th Cir. Jan. 7, 2011)

- **Background:** Shopper in a wheelchair encountered barriers in a store and sued to remove those barriers as well as others he did not personally encounter.
- **Court:** Standing exists either by demonstrating deterrence of returning because of barriers or an injury-in-fact coupled with an intent to return to a noncompliant facility.
- Plaintiff can also sue for removal of those barriers that he did not personally encounter.
- **Query:** Is it proper for court's to focus on the plaintiff's intent to return rather than the defendant's violation of the ADA?
  Please answer "Yes or No."

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Requirements and Barriers When Bringing Suit Under the ADA

Time Limits

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Time Limits – EEOC and State Filing Deadlines

EEOC
U.S. Equal Employment Opportunity Commission

E.E.O.C. Filing Deadlines

- 180 days If no FEPA in your area that has jurisdiction
- 300 days if there is a FEPA in your area with jurisdiction.
- Federal employees must contact the EEO at the agency within 45 days of the action or event.
  - In all but 4 states, (Alabama, Arkansas, Georgia, and Mississippi), an individual has 300 days from the date of alleged harm to file a discrimination charge with the EEOC based on race, color, national origin, sex, religion, and/or disability.
- A lawsuit must be filed within 90 days of receiving a Notice of Right to Sue from the EEOC.

See EEOC Guidance at: www.eeoc.gov/employees/timeliness.cfm.

Another Possible Defense – Time Limits

Possible Barrier: Employee waited too long after the alleged discrimination before filing a Charge

National Railroad Passenger Corp v. Morgan*,* 536 U.S. 101 (2002)

- In a Civil Rights case (Title VII), a man who is African-American alleged that he was "consistently harassed and disciplined more harshly than other employees."
- **Issue:** Does the Continuing Violations Doctrine apply to acts occurring outside the 180 or 300 day charge filing period?
  - The Continuing Violations Doctrine refers to an employer's ongoing discriminatory conduct toward an employee and is usually asserted by a plaintiff to include older acts of alleged discrimination.

Morgan: The Holding

- **Holding (Justice Thomas):** Remanded to district court to determine which actions were part of the alleged hostile work environment and which were separate discrete acts.
  - "Discrete acts of discrimination or retaliation, such as discriminatory discipline or retaliatory termination, should be treated entirely differently than claims of hostile environment."
  - "Hostile environment claims [by their] very nature involve repeated conduct."
  - Discrete discriminatory acts are not actionable if they occurred 180 or 300 days before plaintiff filed a charge with the EEOC, even though the acts are related to acts alleged in a timely filed EEOC Charge.

Morgan: The Implications

- **Implication:** Discrete acts may be a separate violation rather than part of a continuing violation, requiring timely filing of an EEOC Charge.
- **Exceptions:** A "continuing violation" may be shown by:
  - A "hostile work environment." (*Morgan*)
    - Must be "severe and pervasive," creating an abusive working environment for a reasonable person.
  - A failure to make an "individualized assessment." (*Kapche v. City of San Antonio,* 304 F. 3d 493 (5th Cir. 2002)).
  - A "glass ceiling" on promotions (*Croy v. Cobe Laboratories, Inc.,* 345. F. 3d 1199 (10th Cir. 2003)).
  - Retaliation (*Singletary v. District of Columbia,* 351 F.3d 519 (C.A.D.C. December 16, 2003)) (A Title VII Case).

Time Limits – Stretching Time

***Davidson v. America Online, Inc.*,**
337 F.3d 1179 (10th Cir. 2003)

- "Each discrete refusal to hire is a separate actionable unlawful employment practice that 'starts a new clock for filing a charge...
- This remains true even if the discrete act was part of a company-wide or systemic policy." (quoting *Morgan*).

Federal Express Corp. v. Holowecki, 552 U.S. 389(2008)

- U.S. Supreme Court upheld EEOC position that, in addition to the form titled "Charge of Discrimination," certain preliminary filings with the agency also can be considered a "charge" of discrimination for timeline purposes under the ADEA.

Time Limits and *Lilly Ledbetter*

Ledbetter v. Goodyear, 550 U.S. 618 (2007)

- **Court:** New violations, (under Title VII), do not occur each time an employer issues a paycheck.
- **Overturned by Fair Pay Act** – In regard to compensation, an "unlawful employment practice" occurs not only "when a discriminatory compensation decision or other practice is adopted," but also when an individual becomes subject to [or is affected by] the application of a discriminatory compensation decision or other practice."
- **Note:** Also applies to ADA compensation claims.

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Requirements and Barriers When Bringing Suit Under the ADA

Exhaustion of Administrative Remedies

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Title I Exhaustion Requirement – In General

- Plaintiffs must exhaust administrative remedies before filing an ADA Title I Suit.

  See 42 U.S.C. § 2000e-5(e)(1) (Title VII charges must be filed within 180 days ofthe alleged unlawful employment practice); 42 U.S.C. § 12117(a) (applying Title VII remedies and procedures to ADA).

- Failure to cooperate with the EEOC can constitute a failure to exhaust administrative remedies as the EEOC must evaluate the merits of the claim.

  See, e.g., *Shikles v. Sprint/United Mgmt. C*o., 426 F.3d 1304 (10th Cir. 2005).

Title I Exhaustion Requirement – Related Charges

Gibson v. West, 201 F.3d 990 (7th Cir. 2000)

- Failure to exhaust administrative remedies is not a jurisdictional flaw; only a precondition to filing.
  - Therefore, the failure to exhaust administrative remedies is subject to equitable defenses (e.g. waiver, estoppel, equitable tolling).

Anderson v. Embarq/Sprint, 379 Fed. Appx. 924 (11th Cir. 2010)

- A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.
- Judicial claims are allowed if they "'amplify, clarify, or more clearly focus' the allegations in the EEOC complaint, but not if they include 'allegations of new acts of discrimination."

Title I Exhaustion Requirement – Related Charges

Cheek v. Western & Southern Life Ins. Co.,
31 F.3d 497 (7th Cir. 1994).

- EEOC complainants, particularly when filing *pro se*, are not expected to use magic words that explicitly set out legal theories.
- A claim in a complaint is exhausted if it is "like or reasonably related to" an EEOC charge.

Mudgett v. Centegra Health System, Inc.,
2006 U.S. Dist. LEXIS 46277 (June 27, 2006)

- Termination allegation may be reasonably related to a "failure to accommodate claim" not specifically listed in the EEOC Charge.
- **Query:** Is it fair and reasonable to give more leeway to pro se litigants? Please answer "Yes" or "No"

Title I Exhaustion Requirement – Named Defendants

Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, 657 F.2d 890 (7th Cir. 1981).

- The defendant must have been named in an EEOC charge.

But see, Latuga v. Hooters, Inc., 1996 WL 164427 (N.D. Ill. March 29, 1996)

- A *pro-se* plaintiff might be able to bring a claim despite failing to properly name a party in an EEOC charge.
  - Court suggested the same might not be true for a represented party.
  - Here, corporate entities were "so interrelated as to constitute a single employer."
- "[*Eggleston*] recognizes an exception to the rule, where an unnamed party had adequate notice of the charge and an opportunity to participate in conciliation proceedings."

Exhaustion – Titles II, III, and Section 504

- Exhaustion is not a requirement under Title III. *See McInerney v. Rensselaer Polytechnic Inst*., 505 F.3d 135 (2d Cir. 2007).
- Exhaustion is not a requirement under Title II in non-employment cases. 28 C.F.R. §§ 35.170, 35.178, 35.190; *See also* H.R. Rep. No. 485, 101st Cong., 2d Sess. 98 (1990) (exhaustion not required under Title II).
  - In employment cases, public sector employees may need to file at the EEOC as there is a split in circuits regarding exhaustion.
- Unlike the Title I, Section 504 of the Rehabilitation Act does not have an administrative exhaustion requirement for employment charges. 29 U.S.C. § 794a(2).
- Even if there's no exhaustion requirement, a statute of limitations period still applies.
  - This generally follows the personal injury S/L.

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Requirements and Barriers When Bringing Suit Under the ADA

Practical Tips

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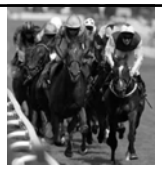
Practical Tips for Filing ADA Lawsuits

- Have EEOC Charges include all possible violations.
- Properly plead standing.
- Make sure all possible defendants are named.
- Exhaust administrative remedies where required.
- Offer periodic training to management and other staff.
- Meet all filing deadlines.
- Check Box for Retaliation on EEOC Charge, if applicable.

General ADA Resources



- **National Network of ADA Centers:** www.adata.org; 800/949 – 4232(V/TTY)
- **DBTAC: Great Lakes ADA Center:** www.adagreatlakes.org; (312) 413-1407 (V/TTY) or (800) 949-4232 (V/TTY)
- **Department of Justice:** www.ada.gov; 800/514-0301 (V); 800/514-0383 (TTY)
- **Equal Employment Opportunity Commission, OCR:** www.eeoc.gov, 800/669-4000 (V); 800/669-6820 (TTY)
- **Equip For Equality**: www.equipforequality.org; 800/537-2632 (Voice); 800/610-2779 (TTY)

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- **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**

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Thank you for Participating In Today's Session:
Requirements and Barriers When Bringing Suit Under the ADA

Next Legal Webinar is July 20, 2011

Drugs, Alcohol and Conduct Rules Under the ADA

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The End

Requirements and Barriers When Bringing Suit Under the ADA

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May 18, 2011

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