ADA Online Learning
ADA National Network

ADA Audio Conference Series
October 18, 2011

This session is scheduled to begin at

2:00pm Eastern Time

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great lakes ADA Center

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act by DBTAC

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ADA Case Law Update

ADA Audio Conference Series
ADA National Network
October 18, 2011
Barry C. Taylor
Legal Advocacy Director
Equip for Equality

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Overview:
ADA Issues to be Discussed

1. ADA Amendments Act
2. Reasonable Accommodation
3. Qualified/Essential Functions
4. Direct Threat
5. Retaliation
6. Education
7. Professional Licensing
8. Criminal Justice
9. Community Integration
10. Standing to Sue
11. Program Accessibility
12. Transportation

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Recent Litigation under the ADA Amendments Act

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Courts Agree Congress Broadened the Definition of Disability

Naber v. Dover Healthcare Assocs., Inc.,
765 F. Supp. 2d 622, 646 (D. Del. 2011)

- Recognizing that the "ADAAA provides that the definition of a disability 'shall be construed in favor of broad coverage of individuals.'"

Gesegnet v. J.B. Hunt Trans., Inc.,
2011 WL 2119248 (W.D. Ky. May 26, 2011)

- "Given the broad definition of disability Congress intended, the Court will assume that Plaintiff has a disability under the ADAAA."

Gibbs v. ADS Alliance Data Systems, Inc.
2011 WL 3205779 (D. Kan. Jul. 28, 2011)

- ADA Amendments Act "lowered the bar" on the disability inquiry.

Episodic Impairments Can Be Substantially Limiting

Kinney v. Century Services Corp., Simmons,
2011 WL 3476569 (S.D. Ind. Aug. 9, 2011)

- Employee requested leave to receive in-patient treatment for depression
- Supervisor said employee was "overreacting" and that "people get sad all the time" and "why do you need to go somewhere for it?"
- Employee not allowed to return from leave, and ultimately terminated.
- **Court:** Applied ADAAA and held that employee had raised question of fact that she has a disability and rejected employer's claim that her "isolated bouts" with depression did not constitute an ADA disability. Court found that an impairment that is "episodic or intermittent" can be an ADA disability if it substantially limits a major life activity when active.

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Episodic Impairments Can Be Substantially Limiting

Feldman v. Law Enforcement Assocs. Corp.,
2011 WL 891447 (E.D.N.C. Mar. 10, 2011)

- Two former employees alleged ADA violations.
- **Court:** Plaintiff with multiple sclerosis is covered by the ADA.
- "ADAAA clearly provides that 'an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.'"
- Because none of the parties disputed that MS, when active, constitutes a disability, this court found plaintiff had sufficiently stated a claim that under the ADAAA.
- The court also cited EEOC's proposed regulations that listed multiple sclerosis as an "'impairment that will consistently meet the definition of a disability.'"

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Episodic Impairments Can Be Substantially Limiting

Medvic v. Compass Sign Co., LLC,
2011 WL 3513499 (E.D. Pa. Aug. 10, 2011)

Court finds that stuttering substantially limiting when active.

Norton v. Assisted Living Concepts, Inc.,
2011 WL 1832952, at *8 (E.D. Tex. May 13, 2011)

"… the court finds that renal cancer, when active, 'substantially limits' the 'major life activity' of 'normal cell growth.' Therefore, that Norton may have been in remission when he returned to work at ALC is of no consequence."

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ADAAA Coverage of Impairments of Short Duration

Feldman v. Law Enforcement Assocs. Corp.,
2011 WL 891447 (E.D.N.C. Mar. 10, 2011)

- **Employer:** Plaintiff with transient ischemic attack (TIA, or a 'mini-stroke') is not covered by the ADA because of its temporary nature, relying on EEOC's proposed regulations which stated that "'Temporary, non-chronic impairments of short duration with little or no residual effects …usually will not substantially limit a major life activity.'"
- **Court:** Plaintiff with TIA is covered by ADA. "TIA 'produces stroke-like symptoms[,]' … As a result, the court finds that a TIA is not comparable to a common cold, a sprained joint, or any other of the examples listed in the proposed EEOC regulations."

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ADAAA Coverage of Impairments of Short Duration

***Patton v. eCardio Diagnostics LLC*,**
2011 WL 2313211 (S.D. Tex. June 9, 2011)

- Employee filed FMLA suit claiming employer terminated her in retaliation for taking time off to care for her daughter who broke her femurs in car accident.
- **Employer:** Daughter's broken femurs did not "substantially limit" her in the major life activity of walking because she was unable to walk for only a few months, relying on pre-ADAAA cases that "temporary, non-chronic impairments generally do not constitute disabilities."
- **Court:** In the spirit of the ADAAA, the intensity of the plaintiff's broken femurs (she could not walk unassisted and used a wheelchair for a number of weeks) allowed the FMLA case to proceed, despite the temporary nature of the impairment.

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Courts have Applied the Expanded List of Major Life Activities in ADAAA

***Norton v. Assisted Living Concepts, Inc.*,**
2011 WL 1832952 (E.D. Tex. May 13, 2011)

- **Issue:** Is renal cancer a disability after the ADAAA?
- **Court:** "Normal cell growth" now constitutes a major life activity. The EEOC's regulations list cancer as an impairment that will "'in virtually all cases, result in a determination of coverage … because it substantially limits the [major life activity] of normal cell growth.'"
- Based on this line of reasoning, the court held unequivocally that "Norton's renal cancer qualifies as a disability even if the only 'major life activity' it 'substantially limited' was 'normal cell growth.'" (Note: this case also illustrates that plaintiffs only have to identify one major life activity for ADA coverage.)

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Courts have Applied the Expanded List of Major Life Activities in ADAAA

***Chalfont v. U.S. Electrodes*,**
2010 WL 5341846 (E.D. Pa. Dec. 28, 2010)

- Under ADAAA, leukemia and heart disease substantially limited plaintiff's normal cell growth and circulatory functions.

Seim v. Three Eagles Communications, Inc.,
2011 WL 2149061 (N.D. Iowa June 1, 2011)

- Graves' Disease and medication side effects substantially limited major bodily functions of immune, circulatory and endocrine systems.

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Courts No Longer Considering Mitigating Measures When Assessing Disability

- **Leg brace not considered under ADAAA** - ***Kintz v. United Parcel Serv., Inc.*,** 766 F. Supp. 2d 1245 (M.D. Ala. 2011)
- **Stuttering substantially limiting, without considering alleviating medication** - ***Medvic v. Compass Sign Co., LLC,*** 2011 WL 3513499 (E.D. Pa. Aug. 10, 2011)
- **Magnifiers not taken into account when assessing disability** - ***Eldredge v. City of St. Paul,*** 2011 WL 3609399 (D. Minn. Aug. 15, 2011)
- **Side effects from medical treatment may be considered for substantial limitation analysis** – ***Sulima v. Tobyhanna Army Depot*,** 602 F.3d 177 (3d Cir. 2010).

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Courts Interpreting "Regarded As" Broadly under the ADAAA

***Fleck v. WILMAC Corp.*,**
2011 WL 1899198 (E.D. Pa. May 19, 2011)

- Plaintiff with ankle injury claimed she was discriminated by employer who regarded her as having a disability.
- **Court:** For regarded as claim, ADAAA de-emphasizes employer's beliefs as to the severity of a perceived impairment,
- The fact that the plaintiff wore a plainly visible boot, that she notified her employer of her need for ankle surgeries, and that she notified her employer that she would need breaks when returning to work raised a plausible inference that defendant regarded plaintiff as disabled within the meaning of the ADAAA.

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Courts Interpreting "Regarded As" Broadly under the ADAAA

***Chamberlain v. Valley Health System, Inc.*,**
781 F.Supp.2d 305 (W.D. Va. 2011)

- **Background:** Employer learned that employee visited a doctor for "visual difficulties." The employer responded by placing employee on involuntary medical leave. Employee submitted documentation that she could function normally in her job, but the employer did not allow her to return to work, and ultimately terminated her. Employee sued alleging that the employer regarded her as having a disability.
- **Court:** Employee can proceed with her ADA case. Employee's supervisor insisted that employee was completely unable to work because of her vision problem. Therefore, the court rejected employer's argument that employee could not meet the regarded as standard because her impairment was transitory and minor.

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Recent Litigation on Reasonable Accommodation

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Reasonable Accommodation Case Law – Interactive Process

***Anderson v. JPMorgan Chase & Co.*,**
418 Fed.Appx. 881 (11th Cir. 2011)

- **Background:** Plaintiff's asthma symptoms flared up when her employer began to clean the carpets around her work station. After refusing to return to work, the employee was terminated and later sued for disability discrimination and retaliation.
- **Court:** No ADA liability as employer engaged fully in the interactive process by moving the employee to five different work stations in an effort to accommodate her. Additionally, the employer permitted the employee to take paid leave, provided her with fans, and offered to remove the carpet from her workspace.

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Reasonable Accommodation Case Law – Interactive Process

***Colwell v. Rite Aid Corporation*,**
602 F.3d 495 (3rd Cir. 2010)

- **Background:** Cashier with glaucoma requested accommodation to be assigned the day shift because her partial blindness prevented her from driving at night. The cashier submitted medical documentation and scheduled a meeting to discuss the requested accommodation. However, the cashier ultimately resigned out of frustration after the pharmacy supervisor failed to show up for the meeting. She then filed ADA suit against the pharmacy alleging failure to accommodate.
- **Court:** Ruled in favor of employee finding that the pharmacy failed to engage in the interactive process. The court further held that a reasonable change in work schedule is the type of accommodation contemplated by the ADA.

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Reasonable Accommodation Case Law – Leave as a Reasonable Accommodation

***Dandler-Hill v. Rochester Institute of Technology*,**
764 F.Supp.2d 577 (W.D.N.Y. 2011)

- **Background:** Employee of fifteen years went on disability leave following an injury to her back, anxiety, and depression. Employee's position kept open for six months while she was on leave. At the conclusion of the leave period, the employee remained unable to work and was approved for long-term disability benefits. She was later terminated by the university.
- **Court:** The court held that the employee was not a qualified individual because her continued need for disability leave demonstrated that she could not perform the essential job functions. The court added that an employer is not required to place an employee on indefinite leave as a reasonable accommodation.

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Reasonable Accommodation Case Law – Leave as a reasonable accommodation

EEOC v. Verizon (settlement reached 7-6-11)

- Verizon agreed to pay $20 million to resolve a nationwide ADA class action lawsuit, in which the EEOC alleged that Verizon unlawfully denied reasonable accommodations of leave to hundreds of employees and disciplined and/or fired them per Verizon's "no fault" attendance plans.

EEOC v. Supervalu (settlement reached 1-5-11)

- Supervalu agreed to pay $3.2 million to settle ADA case. EEOC took the position that Supervalu's policy and practice of terminating employees with disabilities at the end of medical leave rather than bringing them back to work with reasonable accommodations violated the ADA.

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Reasonable Accommodation Case Law – Removing a Reasonable Accommodation

Valle-Arce v. Puerto Rico Ports Authority,
2011 WL 2652449 (1st Cir. July 8, 2011)

- **Background:** Employee was diagnosed with chronic fatigue syndrome. The symptoms made it difficult for the employee to arrive at work on time. For three years, employee was given accommodation of a later start time. A new supervisor removed the accommodation, and the change aggravated the employee's symptoms and forced her to take time off from work, and she was ultimately terminated.
- **Court:** Employee presented sufficient evidence for a jury to conclude that with the reasonable accommodation of a later start time she could perform the essential job functions. (Jury could rely upon employee's prior performance when she had the accommodation.)

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Reasonable Accommodation Case Law – Removing Non-Essential Functions

EEOC v. Autozone, Inc.,
No. 07-1154 (C.D. Ill. June 6, 2011)

- **Background:** Employee was a sales manager who was required to perform certain cleaning tasks, including mopping floors, that violated his medical restrictions. The employee asked for an accommodation not to be assigned mopping responsibilities and provided medical support. The employer refused the request and required the employee to mop, which lead to further injury and a medical leave.
- **Litigation:** EEOC filed suit arguing that mopping floors was a non-essential function of the sales manager position that could have been assigned to other employees, and that the employee could perform all of the essential functions of the job.

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- **Jury:** Found for the employee and returned a verdict of $600,000.

Reasonable Accommodation Case Law – Working from Home as an Accommodation

***Gomez-Gonzalez v. Rural Opportunities, Inc.*,**
626 F.3d 654 (1st Cir. 2010)

- **Background:** Employee with a back impairment and depression requested to work at home four days a week. Although employee had previously been able to split her time between working from home and the office, the employer denied the request and sought to discuss other accommodations. Employee was subsequently fired and sued under ADA
- **Court:** Although employer had previously permitted employee to work from home occasionally, the employee failed to produce evidence that her proposed accommodation to work from home for the majority of the time was reasonable.

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Recent Litigation on Qualified/Essential Functions

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Essential Functions: Attendance

Roberts v. Unitrin Specialty Lines Insurance Co.,
2010 WL 5186773 (5th Cir. Dec. 21, 2010)

- **Background:** Employee injured her back at work and began receiving short-term disability. Six months later, she was notified her disability would end and she was required to return to work. She did not return, but instead produced a doctor's note that she was "unable to function at work" and "when she can return to work is unknown." She was terminated and sued under the ADA.
- **Court:** Plaintiff could not perform the essential functions of the job, because the ability to appear for work is an essential function of the job. Plaintiff was therefore not a qualified individual for the purposes of the ADA, and summary judgment was properly granted.

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Essential Functions: Lifting

Supinski v. United Parcel Service, Inc.,
2011 WL 523078 (3rd Cir. Feb. 15, 2011)

- **Background:** Parcel delivery employee sustained a work-related injury resulting in a doctor-imposed lifting restriction. The restrictions meant he could not perform his previous job, but he sought to return to positions with lighter lifting. UPS refused, asserting that even those positions had greater weight requirements.
- **Court:** Question of fact as to whether lifting weights in excess of Plaintiff's restrictions was an essential function. The only policy UPS produced was created after Plaintiff's request for accommodation, and was ambiguous about the exact amount of weights required to be lifted. Also, a worker in one of the positions Plaintiff sought testified that the job could be performed with Plaintiff's restrictions.

Essential Functions: Flexible Scheduling

Turowski v. Triarc Companies, Inc.,
761 F.Supp.2d 107 (S.D.N.Y. 2011)

- **Background:** Plaintiff worked as a security chauffer for the COO of a large corporation. Subsequently, he sustained a traumatic brain injury that made him more susceptible to fatigue, more short-tempered, and less able to handle changes in his daily schedule. He was ultimately terminated and sued under the ADA.
- **Court:** Flexibility regarding scheduling was an essential function of the position, because the schedule of the chauffer had to change as the schedule of the COO changed. Since Plaintiff could no longer keep a flexible schedule, he was therefore not a qualified individual for the purposes of the ADA, and the court granted summary judgment for the employer.

Qualified: "100% Healed" Policies

Nolan v. Arkema,
2011 WL 3585492 (E.D. Pa., August 15, 2011)

- **Background:** Plaintiff went on disability leave after experiencing a mental and physical problems. Later, Plaintiff's doctor said he could return to work with a couple of restrictions. Employer would not accommodate him with these restrictions and he was terminated. Plaintiff's supervisor stated in a deposition that he could not bring anyone back to work if they had restrictions preventing them from performing 100% of their duties.
- **Court:** Employer's actions could be a "100% healed" policy constituting a *per se* ADA violation that would systemically deny employees reasonable accommodations. Because a reasonable jury could find employer violated ADA, summary judgment was denied.

Recent Litigation on Direct Threat

Direct Threat: Workplace Safety

U.S. EEOC v. Rite-Aid Corp.,
750 F.Supp.2d 564 (D. Md. Nov. 10, 2010)

- **Background:** Employee with epilepsy had several seizures at work, but neither he nor his co-workers were harmed, and employee's doctor cleared him for work. Rite-Aid scheduled examination with the local Epilepsy Center, who cleared employee for work without restrictions. Nevertheless, Rite-Aid scheduled additional exam with doctor with no epilepsy experience, who recommended a leave of absence. Rite-Aid claimed imposed leave did not violate the ADA because employee was direct threat to himself and his co-workers.
- **Court:** Court allowed case to proceed because employee never harmed himself or co-workers during the seizures, and because Rite-Aid's own managers stated employee was not considered a threat.

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Direct Threat: Medical Examinations

James v. James Marine, Inc.,
2011 WL 3417102 (W.D. Ky. Aug. 4, 2011)

- **Background:** Employee took leave following a seizure at work that appeared to be the result of a brain tumor. Employer only would allow the employee to return if he submitted to medical examination that confirmed he would be seizure free for 6 months. Employee sued under ADA claiming medical exam violated ADA.
- **Court:** Although a medical exam can be required if that employee poses a "direct threat", court found employer's reasons for finding such a threat and requiring medical exam were unclear as Plaintiff's own doctor had verified he could return to work after the seizure. Therefore, employee's claim that medical exam violated ADA could proceed.

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Direct Threat: Termination Based on Perceived Threat

Pearson v. Unification Theological Seminary,
2011 WL 1334795 (S.D.N.Y. Mar. 24, 2011)

- **Background:** Employee with depression cursed and threatened supervisor and was ultimately terminated. Employee filed suit under the ADA and other statutes claiming disability discrimination. Employer argued that the termination was justified because the employee's actions rose to the level of her being a direct threat to the health and safety of others in the workplace.
- **Court:** Upheld termination. The court stated that an employer "may discipline or terminate an individual who, because of disability, makes a threat against other employees if the same discipline would be imposed on a non-disabled employee engaged in the same conduct."

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Direct Threat: Termination Based on Perceived Threat

Miller v. Ill. Dept. of Transportation,
643 F.3d 190 (7th Cir. 2011)

- **Background:** Employee with mental illness terminated as a direct threat after making statement in workplace about his supervisor ("Right there is arch enemy number 1. I have never hit a woman. Sometimes I would like to knock her teeth out.")
- **Court:** The court found that a reasonable jury could find direct threat reason pretextual, for three reasons: 1) The statement was ambiguous and not necessarily a threat; 2) An employee without a disability had made a more unambiguous threat and was not terminated; and 3) There had been signs of general hostility toward ADA rights, such as employer statement "we don't grant requests" for accommodation.

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Recent Litigation on Retaliation

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Retaliation: Application of Supreme Court Title VII Retaliation Case to the ADA?

Supreme Court: In ***Thompson v. North American Stainless,*** 131 S.Ct. 863 (2011), the U.S. Supreme Court held that in retaliation cases, an "aggrieved" person under Title VII includes any person with an interest arguably sought to be protected. The court found that the employee fell within "zone of interests" protected by Title VII.

Application to ADA Retaliation Case: In ***Whittaker v. St. Lucie County School Board*****,** 2011 WL 3424564 (S.D. Fla. Aug 5, 2011), a school counselor complained that the district was not properly servicing its students with disabilities, and he was fired soon after making these complaints. In considering whether the counselor was an "aggrieved" person, the court applied the Supreme Court's decision in ***Thompson*** and held that the counselor was within the "zone of interests" because as a counselor, it was his job to educate students with disabilities.

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Was Employee Engaged in a Protected Activity to Support a Retaliation Claim?

- **Background:** Retaliation claims will only succeed when plaintiffs can demonstrate that they were engaged in protected activities, such as filing with the EEOC.
- In ***Stephens-Buie v. Department of Verterans Affairs,*** 2011 WL 2574396, (S.D.N.Y. June 27, 2011), a nurse practitioner was injured at work and sought accommodations when she returned to work. She contacted union officials to assist her when the accommodations were not provided, and she claimed this resulted in harassment at work and eventually her termination. **Court:** Contacting union officials is protected activity giving rise to an accommodation claim.
- In ***Guinup v. Petr-All Petroleum Corp.,*** 2011 WL 1298864, (N.D.N.Y. Mar. 31, 2011), court held that requesting medical leave is a protected activity under the ADA sufficient to sustain a retaliation claim, even if not characterized as a reasonable accommodation.

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Retaliation: Causal Connection Between Adverse Action and Protected Activity?

Background: To prove a retaliation claim, plaintiffs must demonstrate a causal connection between their exercise of a protected activity and the employer's adverse action.

Valle-Arce v. Puerto Rico Ports Auth.,
2011 WL 2652449 (1st Cir. July 8, 2011)

- Employee with Chronic Fatigue Syndrome received several accommodations, but these were removed when she got a new supervisor. She complained about this and subsequently received negative evaluation. Employee sued for retaliation.
- **Court: "**Temporal proximity" of employee's exercise of ADA rights (reinstatement of accommodations) and adverse action (negative evaluation) sufficient to allow retaliation claim to proceed.

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Retaliation: Causal Connection Between Adverse Action and Protected Activity?

Feldman v. Olin Corp.,
2011 WL 711054 (S.D. Ill. Feb. 22, 2011)

- Employee with fibromyalgia and sleep apnea asked that when he returned to work that he be given an accommodation to only work the day shift. The employer, however, assigned him to rotating shift, and he filed an ADA charge with the EEOC. Eight months later, he was suspended and he added a claim of retaliation.
- **Court:** Employee's retaliation claim was rejected. The suspension came eight months after he filed his initial EEOC charge, which the court found to be too far removed to show a causal connection to support a claim for retaliation.

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Recent Litigation on the ADA and Education

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Education Cases: DOJ Reaches Systemic Agreement with Major Education Provider

In re Nobel Learning Communities

DOJ reached agreement with private company operating schools in 15 states to address exclusion of kids with autism. Under the agreement NLC will be:

- Adopting and publicizing non-discrimination policy;
- Stopping unnecessary inquiries into existence of disability;
- Not using eligibility criteria that screen out students with disabilities;
- Adopting process for parents to request reasonable modifications;
- Designating ADA coordinator; and
- Making $215,000 payment to children referred to in case.

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Post-Secondary Education ADA Issues – Modifying "Neutral" Policies

Fialka-Feldman v. Oakland Univ. Bd. of Trustees, 678 F. Supp. 2d 576 (E.D. Mich. 2010)

- **Facts:** Student had cognitive impairments and enrolled in a non-degree program offered by the university for students with disabilities.
- School limited its on-campus housing to students in degree programs. Therefore, plaintiff not allowed to live in campus dorm.
- Student sued under Title II, Rehab Act, & FHA seeking policy modification.
- School argued fundamental alteration to let student live in a campus dorm.

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Post-Secondary Education ADA Issues – Modifying "Neutral" Policies

Fialka-Feldman v. Oakland Univ. Bd. of Trustees

- **Court:** Even though rule was disability neutral, disparate impact on students with disabilities. Denied student equal access to on-campus housing. No individualized inquiry.
- Rejected fundamental alteration argument – school argued it would change the "culture" of on-campus housing and impede students seeking degrees.
- Student contributed to academic purpose of school through active engagement with professors and students.
- School's fundamental alteration defense was grounded in "prejudice, stereotypes, and unfounded fear."

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Recent Litigation on the ADA and Professional Licensing

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Recent Professional Licensing ADA Decisions

Enyart v. National Conference of Bar Examiners, 2011 WL 9735 (9th Cir. Jan. 4, 2011)

- State bar association agreed to let legally blind law school graduate use a laptop with assistive technology (JAWS and Zoom Text), but the national bar examiners refused.
- Graduate had been granted some testing accommodations, including extra time, hourly breaks, and a private room.
- **Appellate Court**: Affirmed lower court injunction allowing use of assistive technology on the laptop.
- Previously granted accommodations did not make the exam accessible to the plaintiff and did not provide "effective communication."

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Recent Professional Licensing ADA Decisions

Enyart v. National Conference of Bar the Examiners

- **Title III regulation:** Examination must be "administered so as to *best ensure* that … the examination results accurately reflect individual's aptitude or achievement level or whatever other factor the examination purports to measure."
- **Court:** Applying this "best ensure" standard, the accommodations offered to the plaintiff would not make the exam accessible because she would still suffer eye fatigue, disorientation, and nausea.
- Rejected NCBE's argument that the plaintiff's success on other standardized tests without assistive technology demonstrated that the bar exam was accessible.
- The court noted that the plaintiff's disability was progressive and that testing accommodations should advance as technology progresses.

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Recent Professional Licensing ADA Decisions

Enyart v. National Conference of Bar the Examiners

- **Supreme Court:** NCBE sought review of 9th Circuit decision taking issue with "best ensure" standard, but the Supreme Court declined to accept the case. ***See* 2011 WL 4536525 (Oct. 3, 2011)**
- **Other Courts Applying "Best Ensure" Standard:** Several lower courts are following ***Enyart*** and applying the "Best Ensure" standard in other bar exam cases. ***See Jones v. National Conference of Bar Examiners,*** 2011 WL 3321507 (D. Vt. Aug. 2, 2011); ***Elder v. National Conference of Bar Examiners,*** 2011 WL 672662 (N.D. Ca. Feb. 16, 2011); and ***Bonnette v. District of Columbia Court of Appeals,*** 2011 WL 2714896 (D.D.C. July 11, 2011).

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Background on National Board of Medical Examiners

- The National Board of Medical Examiners ("NBME") is a non-profit corporation that develops and administers the United States Medical Licensing Examination ("USMLE").
- Measures the student's mastery of basic medical sciences and the ability to apply this knowledge.
- Exam is administered in three steps.
  - Several cases involve the denial of accommodations for the first step, which comes after the second year of medical school.
- A second-year medical student usually cannot move on to the third year until passing USMLE Step 1.

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DOJ Settlement with National Board of Medical Examiners

- NBME accommodation process should become simplified after a recent settlement announced by DOJ on Feb. 22, 2011.
- Case involved the extensive documentation required by the NBME from applicants seeking testing accommodations.
- Under the settlement, a Yale Medical School student with dyslexia will receive double testing time and a separate testing area.
- In addition, the NBME will be required to:
  - Only request documentation about:

    (a) the existence of a physical or mental impairment;

    (b) whether the applicant's impairment substantially limits one or more major life activities within the meaning of the ADA; and

    (c) whether and how the impairment limits the applicant's ability to take the USMLE under standard conditions.

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DOJ Settlement with National Board of Medical Examiners

The NBME will also be required to:

- Carefully consider the recommendations of qualified professionals who have personally observed the applicant in a clinical setting and recommended accommodations; and
- Carefully consider all evidence indicating whether an individual's ability to read is substantially limited within the meaning of the ADA.

The settlement can be found at:
http://www.ada.gov/nbme.htm

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Recent Litigation on the ADA and Criminal Justice

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Recent Criminal Justice ADA Decisions – Removing Barriers

Pierce v. County of Orange,
2011 WL 68843 (C.D. Cal. Jan. 7, 2011)

- Court rejected County's argument that removing barriers and increasing access to programs and services would present undue burdens because of finances and security.

***Durrenberger v. Tex. Dep't of Criminal Justice*,**
WL 5014338 (S.D. Tex. Dec. 2, 2010)

- Court rejected jail's argument that providing a phone amplifier or an isolated booth to hard of hearing visitors would be an undue burden.

Minnis v. Johnson, 1:10-cv-96-TSE-TRJ (E.D. Va. Nov. 9, 2010)

- Class action settlement reached on behalf of deaf prisoners seeking videophones and other accommodations.

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Recent Criminal Justice ADA Decisions – Recognizing and Accommodating Disability

Buben v. City of Lone Tree,

2010 WL 3894185 (D. Colo. Sept. 30, 2010)

- Law enforcement officials may be liable under Title II of the ADA for arresting a person with mental illness when they misperceived the effects of the arrestee's disability as illegal conduct. Duty to reasonably accommodate a person with a disability during the course of an arrest.

Hobart v. City of Stafford,

2010 WL 3894112 (S.D. Tex. Sept. 29, 2010)

- Instead of sending police crisis intervention team to address person with mental illness in severe distress, an untrained patrol officer was dispatched and he ended up shooting and killing the person with mental illness. Parents' Title II failure to accommodate claim was allowed to proceed.

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Recent Litigation on the ADA and Community Integration

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Factors Set forth by Supreme Court in *Olmstead*

- **Community integration requirements:**
  - Treatment officials find community is appropriate
  - Person does not oppose placement in the community
  - Placement can be reasonably accommodated taking into account State resources & needs of other pwds
- **State can meet its ADA obligations if it has a :**
  - ***comprehensive, effectively working plan*** for placing people with disabilities in less restrictive settings;
  - ***waiting list that moves at a reasonable pace*** not controlled by the State's efforts to keep its institutions fully populated.

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Recent Community Integration Decisions – Private Facilities Covered

Williams v. Quinn,

2010 WL 3894350, (N.D. Ill. September 29, 2010)

- Class action against state officials on behalf people with mental illness living in large private state-funded facilities known as Institutions for Mental Disease (IMDs).
- Comprehensive Consent Decree entered by judge 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).

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Recent Community Integration Decisions – Private Facilities Covered

Williams v. Quinn (cont.)

- State entitled to new federal money to support community services for class members. (IMDs are 100% state funded, which undercut fundamental alteration argument)
- Significant decision because it makes clear that ADA/*Olmstead* applies to privately owned facilities that receive state funding.
- Similar settlements in Illinois on behalf of people with developmental disabilities (*Ligas v. Hamos*) and people with mental illness and physical disabilities in nursing homes (*Colbert v. Quinn*)

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Recent Community Integration Decisions – Comprehensive Plan

***Benjamin v. Dept. of Public Welfare*,**
2011 WL 1261542 (M.D. Pa. Jan. 27, 2011)

- **Background:** class action on behalf of 1,000 residents with intellectual disabilities who are unnecessarily institutionalized in state facilities.
- **Court:** The Court held that the state is violating the ADA by failing to provide community services to residents who could reside in the community with appropriate supports and services and who do not oppose moving to the community.
- **No "Olmstead" Plan:** In rejecting the State's fundamental alteration defense, the court found the recently and hastily created community integration plan was insufficient as it only contained "general assurances." "Good faith intentions do not meet federal law or patient expectations." The State has filed an appeal.

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Recent Community Integration Decisions – DOJ Settlement

***U.S. v. Georgia*,**
(N.D. Ga. 1:10-CV-249-CAP)

DOJ negotiates comprehensive settlement on behalf of people with mental illness in institutions. The agreement provides:

- Georgia will increase its assertive community treatment, case management, supported housing and supported employment programs to serve 9,000 individuals with mental illness in the community;
- Increase community crisis services to respond to people in a mental health crisis without admission to a state hospital; and
- Create at least 1,000 Medicaid waivers to transition all individuals with developmental disabilities from the state hospitals to community settings and increase community service capacity to meet their needs

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Recent Litigation on the Definition of Public Accommodation

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Recent Decision Interpreting Definition of Public Accommodation

Peoples v. Discover Financial Services,
387 Fed. App'x. 179 (3d Cir. 2010)

- Blind credit card customer reported overbilling on his credit card by prostitute. Credit card company found no fraud had occurred since customer had signed the receipts. He sued under Title III of the ADA.
- **Court:** No Title III liability. Credit card company is not a "place" of public accommodation - alleged discrimination does not relate to the physical property that the company owns.
- **Split in Circuits:** Some courts require physical space for Title III liability and other courts do not take such a literal view of place of public accommodation. Big issue since so much commerce is no longer done in physical spaces, but instead via the internet. Petition asking Supreme Court to take case and resolve split in authority was denied.

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Recent Litigation on the ADA and Effective Communication

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Effective Communication – Access to Health Care

Adamski-Thorpe v. Stevens Mem'l Hosp.,
2010 WL 5018141 (W.D. Wash. Dec. 3, 2010)

- Hospital failed to provide ASL interpreter on three different occasions. Hospital failure to provide interpreter was "administrative error", not intentional discrimination.
- **Court:** Plaintiff provided sufficient evidence that hospital's actions could meet the "deliberate indifference" requirement.

Colo. Cross-Disability Coal. v. Women's Health Care, P.C.,
2010 WL 4318845 (D. Colo. Oct. 25, 2010)

- Refusal of hospital to provide deaf patient with interpreter from a particular agency did not violate the ADA. Plaintiff did not provide sufficient evidence that previous interpreters were not qualified.

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Effective Communication – Emergency Situations

***Loye v. County of Dakota*,**
2010 WL 4629460 (8th Cir. Nov. 17, 2010)

- **Background:** Following a mercury spill, four individuals who are deaf sued after they were not provided effective communication during emergency response services provided by the County.
- **Court:** Evacuation made obtaining interpreters not reasonable and, on the whole, effective communications were provided in the later stages of the situation. Court did not agree with the plaintiffs' "literal reading" of the DOJ's regulation requiring Title II entities to ensure that communications with people with disabilities are *as effective as* communications with others.
- The U.S. Supreme Court declined to review this case. *See,*131 S.Ct. 2111

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Recent Litigation on the ADA and Standing to Sue

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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

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Standing to Sue – Cases Where Plaintiff Did Not Have Standing

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

- Title III suit brought by out of town wheelchair user against a mall for inaccessibility was dismissed for lack of standing. Court found plaintiff's plan to return too vague.

Rush v. Denco Enterprises,
2011 WL 1812752 (C.D. Cal. May 12, 2011)

- Title III suit brought against a restaurant was dismissed because she failed to identify the barriers she personally encountered.

Wittmann v. Island Hospitality Management,
2011 WL 689613 (D.N.J. Feb. 18, 2011)

- Woman denied access to a hotel because of her service animal sued under Title III. Case dismissed for lack of standing because of the indefiniteness of plaintiff's plan to return to the hotel.

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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.

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Standing to Sue – Cases Where Plaintiff Had Standing

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 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 locations they had not visited.

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Recent Litigation on the ADA and Program Accessibility

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Frame v. Arlington – Public Entity Services

Frame v. City of Arlington,
2011 WL 4089778 (5th Cir. Sept. 15, 2011)

- **Facts:** Residents who use wheelchairs alleged a failure to make curbs, sidewalks and certain parking lots accessible. City claims too late for plaintiffs to sue under Title II.
- **Issue:** When does statute of limitation begin to run – when sidewalks were constructed or when the access barrier is encountered?
- **Previous Decision:** Ruling for the City - statute of limitations begins when the sidewalk was constructed.
- **Rehearing En Banc:** Ruling for the Plaintiff - statute of limitations begins when Plaintiff knew or should of known about inaccessible sidewalk. Court also held sidewalks are "services" under Title II, so City must take reasonable measures to make sidewalks accessible.

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Program Accessibility – Access to the State Lottery

***Winbourne v. Virginia Lottery*,**
577 S.E.2d 304 (June 4, 2009), *settlmt. reached* Feb. 18, 2011

- **Background:** Four wheelchairs users were unable to enter a number of businesses that were also retailers for the Virginia Lottery. They filed ADA suit against the Virginia Lottery for the failure to ensure that its retailers were accessible to people with disabilities.
- **Court:** After lower court found against the plaintiffs, the Virginia Supreme Court found that the Virginia Lottery is a service, program or activity under the ADA. By failing to ensure access to its program, the Virginia Lottery violated Title II.
- **Settlement:** The parties r reached a settlement in which: 1) all new lottery operators must be accessible within 12 months, 2) all existing retailers will be surveyed every 3 years, and 3) any necessary modifications up to $1,000 must be completed within 12 months.

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Recent Litigation on the ADA and Transportation

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Recent ADA Transportation Cases – Maintenance or Alterations?

***Disabled in Action v. SEPTA*,**
2011 WL 522947 (3d Cir. Feb. 16, 2011)

- Transit agency violated ADA when it failed to add elevators when renovating train stations and court ordered installation of elevators.
- Court rejected argument that these were "maintenance" projects and not "alterations" which trigger accessibility requirements.
- Court rejected argument that elevators were not financially "feasible." Feasibility exception only applies when nature of existing facility makes it impossible to make accessible.

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Recent ADA Transportation Cases – DOJ Negotiates Systemic Agreement

Crawford v. City of Jackson & JATRAN

(S.D. Miss #08-586)

DOJ intervened in systemic transportation suit alleging ADA violations in mainline and paratransit services. Agreement will last for 5 years and its main terms provide City will:

- Maintain the wheelchair lifts of mainline buses;
- Adequately train personnel to properly assist passengers with disabilities; and
- Meet required level of service to paratransit riders.

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Recent ADA Transportation Cases – DOJ Negotiates Systemic Agreement

In re Tornado Bus Company

(Dallas, Texas)

Background: Private bus company had only 1 accessible bus in a fleet of 53 buses, but ADA regulations require that at least 50 percent of a carrier's vehicles must be accessible.

Agreement: DOJ and DOT reached agreement with bus company that will result in:

- Upgrading bus fleet to meet ADA accessibility requirements; and
- Payment of $55,000 fine.

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General ADA Resources

- **ADA National Network** www.adata.org
- **Department of Justice –** www.ada.gov
- **Job Accommodation Network -** www.jan.wvu.edu
- **Equal Employment Opportunity Commission** www.eeoc.gov
- **National Disability Rights Network (NDRN)** www.ndrn.org

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ADA Case Law Database

ADA CASE LAW DATABASE

ADA Case Law Database is a comprehensive search tool that provides information pertaining to significant rulings under the Employment (Title I), Local and State Government (Title II) and Places of Public Accommodations (Title III) provisions of the Americans with Disabilities Act (ADA).

The database is a unique research tool specially designed to search by a variety of variables including but not limited to disability type, discrimination issue, jurisdiction and remedy.

www.adacaselaw.org

The database was developed by the Great Lakes ADA Center on behalf of the ADA National Network as a mechanism to track major decisions and summarize the key issues so that they are understandable to a broader audience.

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ADA Case Law Update

Questions in the Webinar Platform
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