

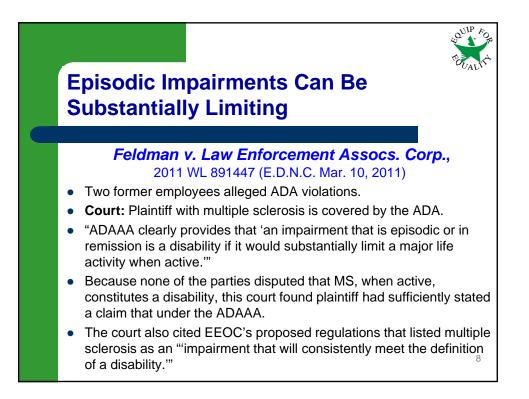




# Episodic Impairments Can Be Substantially Limiting

#### 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.





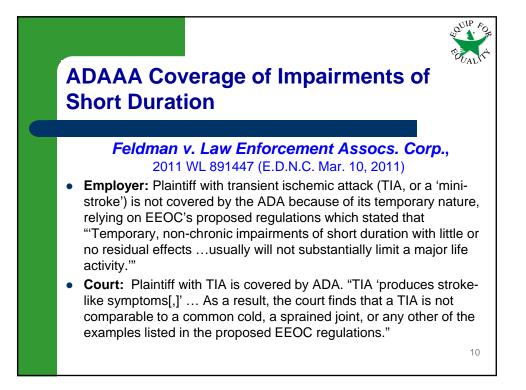
# Episodic Impairments Can Be Substantially Limiting

*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."

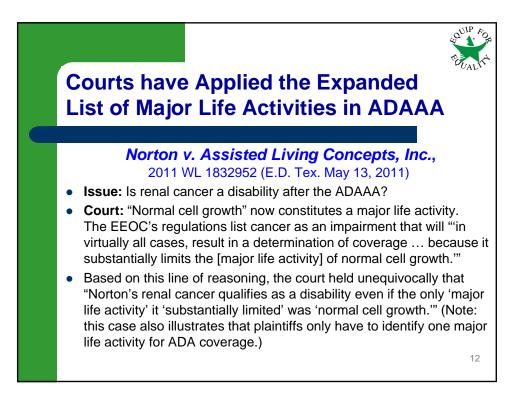




# ADAAA Coverage of Impairments of Short Duration

# 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.





## 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.





## Courts Interpreting "Regarded As" Broadly under the ADAAA

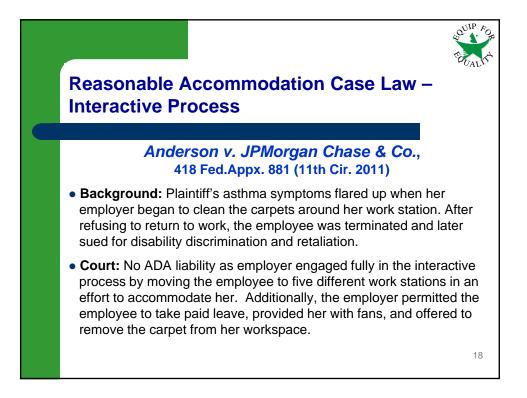
# *Fleck v. WILMAC Corp.,* 2011 WL 1899198 (E.D. Pa. May 19, 2011)

- 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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#### 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<sub>19</sub> contemplated by the ADA.





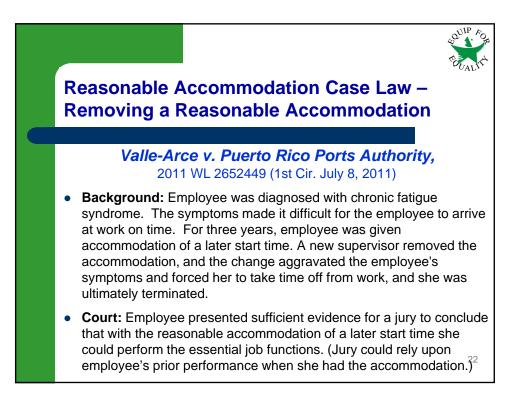
#### Reasonable Accommodation Case Law – Leave as a reasonable accommodation

#### 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.

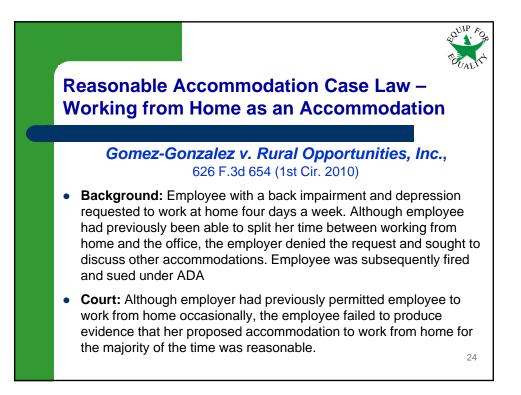




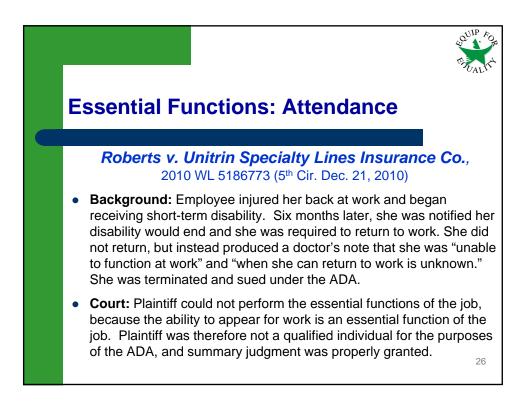
#### Reasonable Accommodation Case Law – Removing Non-Essential Functions

#### **EEOC v. Autozone, Inc.,** No. 07-1154 (C.D. III. 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 nonessential 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.
- Jury: Found for the employee and returned a verdict of \$600,000.





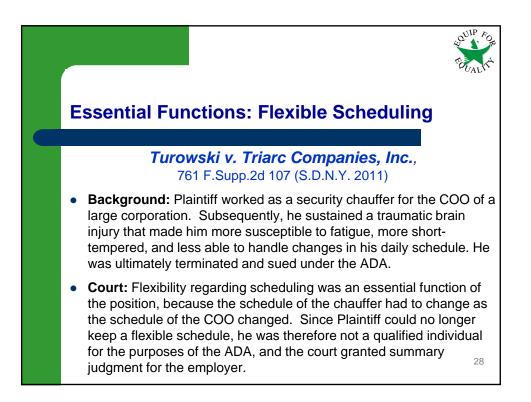




### **Essential Functions: Lifting**

#### 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.<sup>27</sup>





## **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.<sup>29</sup>

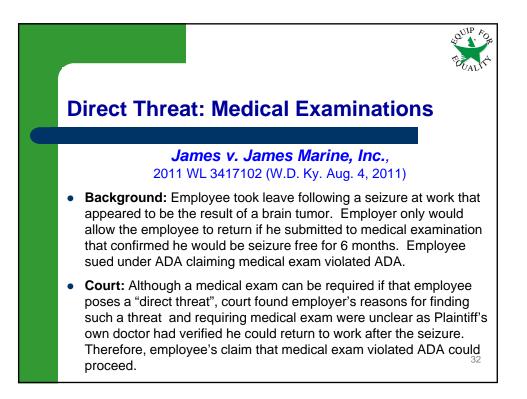




### **Direct Threat: Workplace Safety**

# *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.<sup>31</sup>





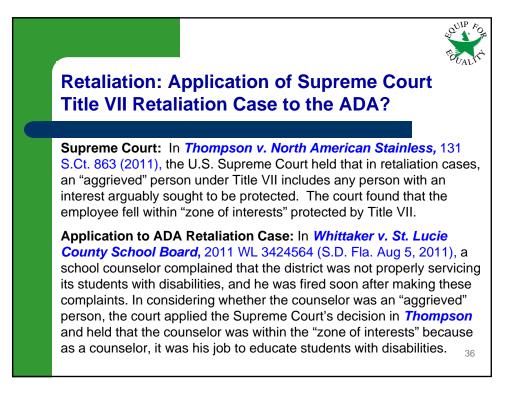
# Direct Threat: Termination Based on Perceived Threat

#### 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."









#### 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<sup>37</sup> claim, even if not characterized as a reasonable accommodation.





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#### **Retaliation: Causal Connection Between Adverse Action and Protected Activity?**

#### *Feldman v. Olin Corp.,* 2011 WL 711054 (S.D. III. 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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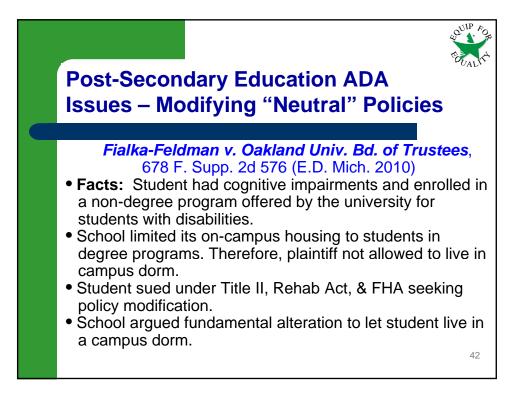
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#### Education Cases: DOJ Reaches Systemic Agreement with Major Education Provider

#### 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.





# 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."



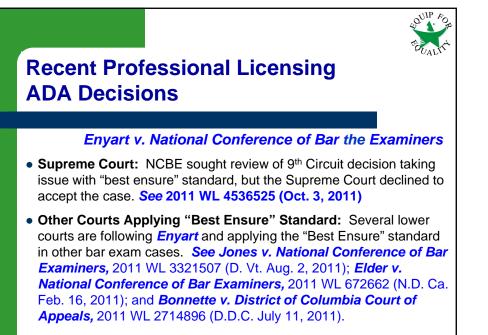


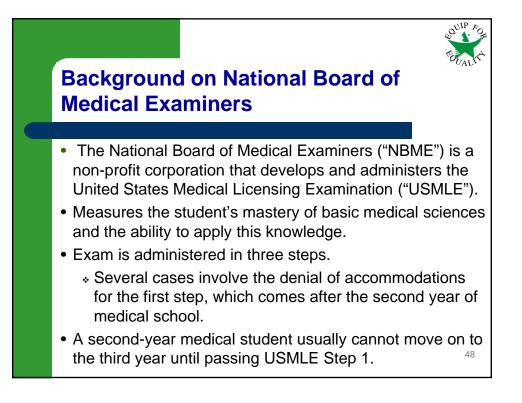
# Recent Professional Licensing ADA Decisions

# *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."



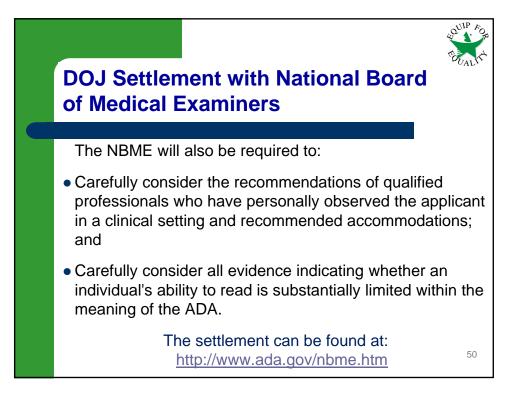


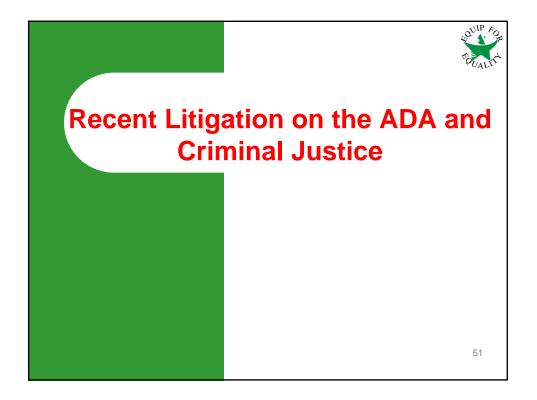


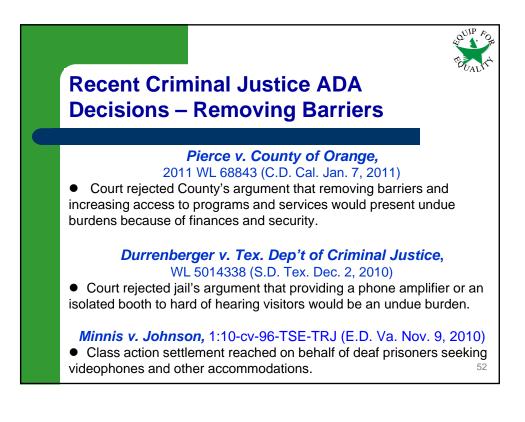


# DOJ Settlement with National Board of Medical Examiners

- 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.









#### 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 53 proceed.









## 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 57 homes (*Colbert v. Quinn*)





## Recent Community Integration Decisions – DOJ Settlement

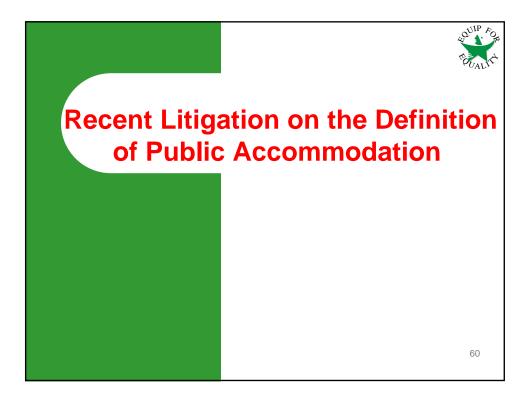
#### **U.S. v. Georgia**, (N.D. Ga. 1:10-CV-249-CAP)

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 59





# 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 <sup>61</sup> Supreme Court to take case and resolve split in authority was denied.





# 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.









# 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.

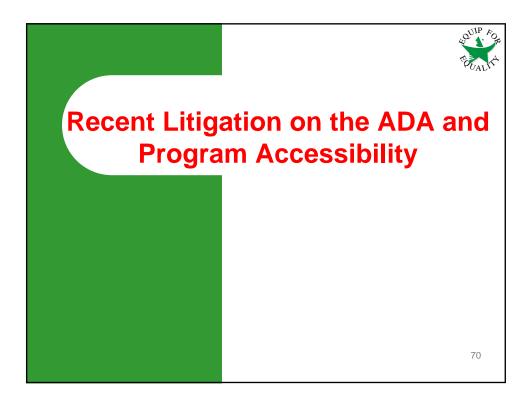




# Standing to Sue – Cases Where Plaintiff Had Standing

**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.

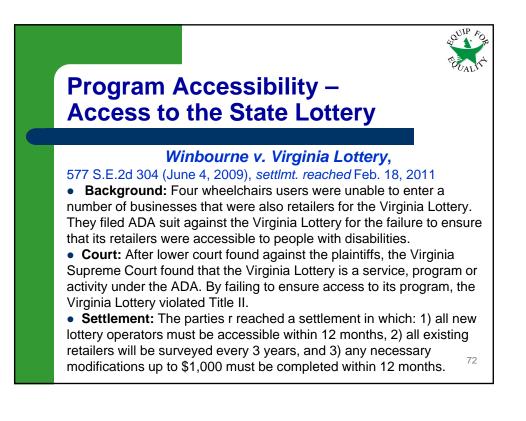


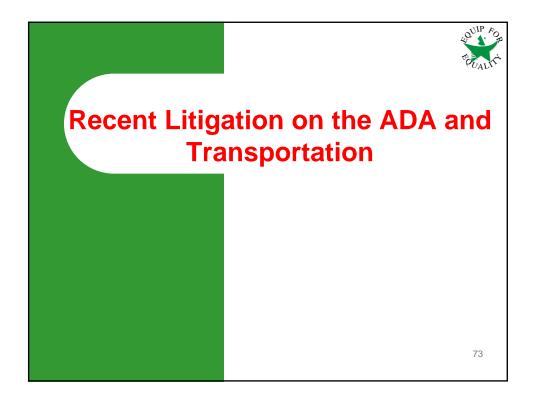


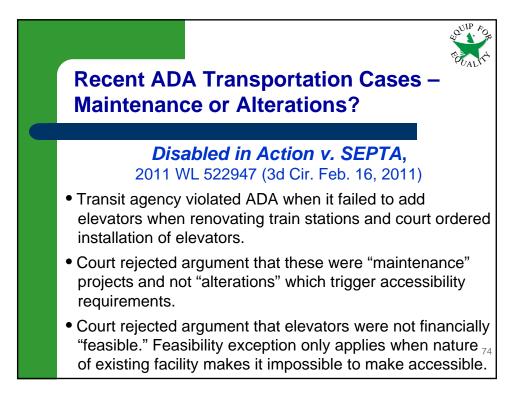
# *Frame v. Arlington* – Public Entity Services

#### *Frame v. City of Arlington,* 2011 WL 4089778 (5<sup>th</sup> 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. <sup>71</sup>









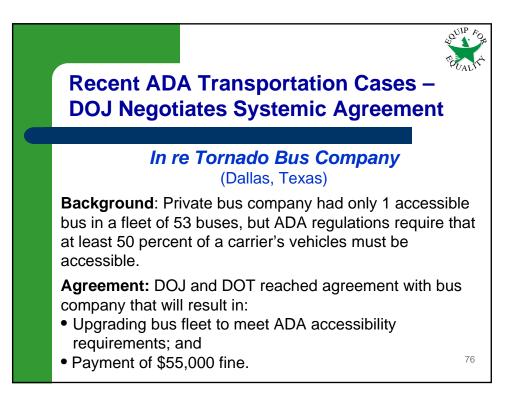
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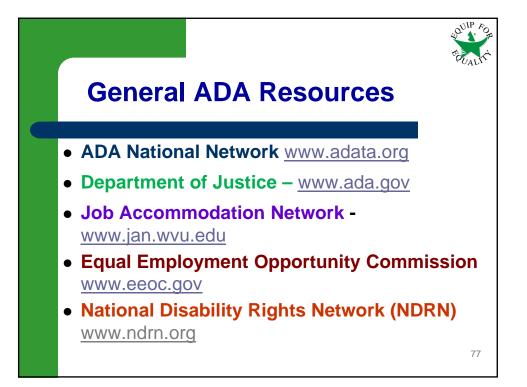
# Recent ADA Transportation Cases – DOJ Negotiates Systemic Agreement

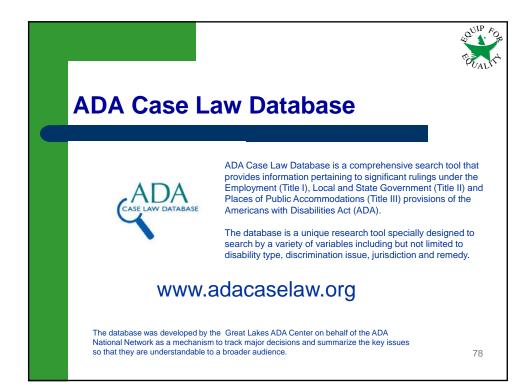
#### Crawford v. City of Jackson & JATRAN (S.D. Miss #08-586)

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.









# **ADA Case Law Update**



Questions in the Webinar Platform You may submit questions in the Chat Area Text box. Keystrokes to enter the chat area are Control-M.

