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Legal Issues Webinar Series**


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ADA ONLINE
LEARNING

**The ADA in the
Healthcare Setting**


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

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 National Network
Advocates, Providers and Training for the
Community with Disabilities Act

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Credit for Illinois Attorneys



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

Query: How many participants today are -


- A. Advocates for people with disabilities
- B. Represent employers or other covered entities
- C. Innocent, unbiased bystanders


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Overview – ADA in the Healthcare Setting

- **Title I**
 - ◊ Reasonable Accommodations
 - Including Being Qualified to Perform Essential Job Functions
 - ◊ Direct Threats to Health and Safety
- **Title III (and Title II)**
 - ◊ Pending DOJ Regulations on Accessible Medical Equipment
 - ◊ Legal Standing
 - ◊ Issues involving Patients Living With HIV
 - ◊ Effective Communication
 - ◊ Service Animals
 - ◊ Settlements




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Title I:
Reasonable Accommodations




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Reasonable Accommodation: In General

- Request is the first step in an informal, interactive process between employee & employer.
 - ◊ No magic words but condition and limitations should be specified.
 - ◊ Can be made by anyone on the employee's behalf.
- Employers should “respond expeditiously” as “unnecessary delays can result in a violation of the ADA.”



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Reasonable Accommodation: In General

- Employers must provide an “effective accommodation,” not necessarily the employee’s preferred accommodation.
 - Employees’ preference should be given “primary consideration.”
 - Accommodations do not have to be provided if “undue hardship.”
- “Good faith” can prevent punitive and certain compensatory damages.

See 42 U.S.C. §1981a(a)(3); EEOC Guidance “Reasonable Accommodation and Undue Hardship...,” found at:
<http://www.eeoc.gov/policy/docs/accommodation.html>;

Great Lakes ADA Center Legal Brief, “Reasonable Accommodation for People with Psychiatric Disabilities...,” and other briefs found at:
<http://www.adagreatlakes.org/Publications/#legalBrief>.



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Lifting/Walking Restrictions for Nurses - Griffin

Griffin v. Prince William Health System,
2011 WL 1597508 (E.D. Va. Apr. 26, 2011).

- RN with a 25-pound lifting limit requested reasonable accommodation of having other nurses help with lifting.
- **Court:** Lifting 40 pounds was an essential function.
- Proposed request amounted to creating a new position.
- Noted that one essential function was to respond to emergencies, such as patients falling/fainting, and that Ms. Griffin would not have been able to perform these.

See also, *Ingerson v. Healthsouth Corp.*, 139 F.3d 912 (10th Cir. 1998) (lifting restriction); *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997) (nurse needed to be able to administer drugs).



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Lifting/Walking Restrictions for Nurses - Stafne

Stafne v. Unicare Homes, 266 F.3d 771 (8th Cir. 2001).

- Nurse with rheumatoid arthritis had walking limitations.
- **Employees Drs.:** Needed a “totally sedentary sit-down job” and was qualified for “seated work only.”
- **Requested Accommodation:** Using a motorized scooter, called an Amigo.
- **Court:** Affirmed a jury verdict for employer - employee was unqualified to perform her job’s essential functions.
 - Nurse did not demonstrate how she could push other people in wheelchairs using an Amigo, or perform the Heimlich maneuver.



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Part-Time or Modified Work Schedules - *Rask*

Rask v. Fresenius Medical Care North America,
2007 WL 4258620 (8th Cir. December 6, 2007).

- A kidney dialysis technician with clinical depression was terminated for irregular attendance resulting from adverse side effects of medication.
- She claimed she should have been given a reasonable accommodation allowing sudden, unscheduled absences prior to terminating her employment.
- **Court:** Request was not reasonable.
- Proposed accommodation may personally benefit the technician, but it would not assist in job performance.



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Restrictions can be Reasonably Accommodated - *Sydnor*

Sydnor v. Fairfax County, Va.,
2011 WL 836948 (E.D. Va. Mar. 3, 2011).

- Public health nurse had multiple chronic conditions including fibromyalgia, inflammatory arthritis, and back conditions.
- Exhausted FMLA leave but still had lifting and walking limitations.
- **Court:** Defendant did not contradict dr. note stating plaintiff could perform her duties with a lightweight wheelchair.
 - ◊ *E.g.*, explained that she could help a seated patient who fainted by putting "the patient on the exam table instead of a chair before giving him or her the shot."
- **Note:** Contrast this case with *Griffin* and *Stafne*.



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Auxiliary Aids May Be Reasonable – *Wright*

Wright v. Hosp. Auth. of Houston County,
2009 WL 274148 (M.D. Ga. Feb. 3, 2009).

- RN with significant hearing loss was placed on leave and subjected to fitness for duty tests after a communication breakdown.
- Plaintiff received a pager, but also sought a text telephone, TTY, telephone amplifiers, a visual alarm, and a sign language interpreter for meetings.
- **Court:** Did not agree with hospital that "good hearing acuity" was an essential function simply because it's in job description.
 - ◊ Hospital did not specify the specific functions that were implicated, therefore nurse's claim could proceed.
 - ◊ Fitness for duty was appropriate due to potential threat.



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Cases Where Doctors Could Not Be Reasonably Accommodated

Robertson v. Neuromedical Ctr., 983 F.Supp. 669 (M.D. La. Oct. 10, 1997).

- **Court:** No reasonable accommodation was possible for doctor with ADHD who was not able to handle paperwork as this was an essential function of being doctor.
- No requirement to hire an administrative assistant for him
 - Dr. still had to interpret test results and complete patient charts.
- The doctor had already made mistakes in patients' charts and dispensing medication and therefore posed a "direct threat."
- See also, *Stopka v. Med. Univ. of South Carolina*, 2007 WL 2022188 (D.S.C. July 11, 2007)(Scanner that read information would not be effective for a Dr. with a brain injury as it could not read handwriting – hiring a reader not required).



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Allowing Doctor's Service Animal Was Reasonable - *Branson*

Branson v. West, 1999 WL 1129598 (N.D. Ill. Dec. 3, 1999), amended mem. opinion and order at 1999 WL 1186420 (N.D. Ill. 1999).

- Title III employment case – independent contractor.
- Dr. with paraplegia used service dog primarily to pull her manual wheelchair so she would not overuse her upper extremities.
- Rejected the hospital's suggestion that she use a motorized wheelchair instead as she thought it would limit her independence.
- **Court:** VA hospital violated the federal Rehab. Act by refusing access for her service animal.
- VA did not show any undue burden or direct threat as it (and other VA) already permitted seeing-eye dogs in its facility.



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Other Cases – "Take-Down" Training



Hennagir v. Utah DOC, 2009 WL 2883037 (10th Cir. 2009).

- Undergoing "take-down" training was an essential function for a physician's asst. even though it had not been required for 8 yrs. - therefore plaintiff was not qualified.

Johnston v. Morton Plant Mease Healthcare, Inc., 2008 WL 191026 (M.D. Fla. 2008).


- Question of fact whether "take-down" training was an essential function for a nurse in a psychiatric unit, so plaintiff's discrimination claim could proceed.



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Time to Vote




- **Query:** Should nurses be accommodated more readily than doctors?
- **Please Vote:** A. Yes B. No

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**Title I:
Direct Threat**



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Direct Threat Definition



- “A significant risk of substantial harm to the health or safety of the individual or others...”
- “...that cannot be eliminated or reduced by reasonable accommodation.”
 - ✦ Requires an “individualized assessment...based on a reasonable medical judgment that relies on...the most current medical knowledge and/or on the best available objective evidence.”

42 U.S.C. §§ 12111, 12113; 29 C.F.R. §1630.2(r); *Great Lakes ADA Center Legal Brief, “Direct Threat Under the ADA,” and other briefs found at: <http://www.adagreatlakes.org/Publications/#legalBrief>.*

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Direct Threat In Healthcare Settings – In General

- **Note:** Historically courts have been deferential to healthcare providers in direct threat cases due to concerns with patient safety.
- See, e.g., *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001)(termination of a dental hygienist living with HIV did not violate ADA, even if the risk of transmission “low,” or seemingly hypothetical, as “this is not a ‘somebody has to die first’ standard.”)
- **Note:** In *Wardell*, the court made some assumptions about HIV in 2001 that other courts may not have made then or now. See Great Lakes ADA Center Legal Brief for additional cases.

Seizures Posed a Direct Threat – *Johnson*

Johnson v. Shawnee County Bd. Of County Commissioners, 2003 WL 21305402 (D. Kan. May 28, 2003), *aff'd* 2004 WL 1260305 (10th Cir. 2004).

- RN had a history of fibromyalgia and seizures.
- When seizures increased, placed on leave and eventually terminated.
 - ◊ Required to provide a Dr.’s opinion stating she would not be a direct threat.
- **Court:** Termination was proper - nurse posed a “direct threat” as she regularly “spaces out” for 10-15 seconds at a time without warning.
- Unsafe to perform her job duties of handling emergency situations; triage; giving injections; drawing blood; and handling medications.
 - ◊ Also noted that she worked in a detention facility, requiring that the nursing staff “be alert and able to exercise professional judgment.”

Direct Threat in the Operating Room - *Jakubowski*



Jakubowski v. Christ Hospital, 2009 WL 2407766 (S.D. Ohio 2009).

- Resident with Asperger’s Syndrome alleged wrongful termination and failure to accommodate.
- Previously, resident repeatedly received negative reviews from other doctors relating to his communication skills.
- **Court:** Summary judgment for hospital – no ADA violation
 - ◊ In performing medical work, plaintiff’s disability and lack of communication skills posed a direct threat to patients.
 - ◊ Plaintiff’s requested accommodation, “knowledge and understanding” by the hospital’s staff, did not adequately address legitimate safety concerns.

Cognitive Limitations – *Stopka*

Stopka v. Med. Univ. of South Carolina,
2007 WL 2022188 (D.S.C. July 11, 2007).

- A hospital resident had impaired vision, acquired dyslexia, and slowed reading due to a head injury incurred during medical school.
- Hospital allowed him to see only 2-3 patients instead of 10-15 and to spend 45-50 minutes per patient instead of 15 min.
- Performance continued to deteriorate – issues with memory, decision-making, and recognizing his own limitations.
 - ◊ As a result, his employment was terminated.
- **Court:** Termination was proper as his cognitive impairments posed a direct threat to patient safety.
- **Note:** Reducing job duties may not be required by the ADA.



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Alcohol Issues – *Altman & Bekker*

Altman v. NYC Health & Hosp. Corp., 903 F.Supp. 503 (S.D.N.Y. 1995)

- Chief of Medicine with alcoholism was suspended for being visibly drunk while treating a patient.
- Told to get treatment for there to be a “possibility” of returning.
 - ◊ Nevertheless, he was not reinstated after getting treatment.
- **Court:** Despite three months of recovery, the extreme risks to patients from an undetected relapse were too great.

Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 672 (7th Cir. 2000).

- Termination of Dr. for treating patients while under the influence of alcohol was proper.



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Alcohol & Narcotic Issues – *Nicholson & Dovenmuehler*

Nicholson v. West Penn Allegheny Health System,
2007 WL 3120275 (W.D. Pa. Oct. 23, 2007).

- Hospital RN with alcoholism, PTSD, and depression, due to being a crime victim, posed a direct threat to patients as she violated a Last Chance Agreement by drinking and calling a co-worker.

Dovenmuehler v. St. Cloud Hospital, 509 F.3d 435 (8th Cir. 2007).

- Nurse’s illegal conduct of stealing prescription medications is not protected by the ADA.



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ICU Nurse and Narcotic Issues – *Griel*

Griel v. Franklin Med Ctr., 71 F.Supp.2d 1 (D. Mass. Nov. 23, 1999).

- ICU Nurse was previously terminated for diverting narcotics.
 - ◊ Completed a five-year addiction recovery program and regularly attended AA and other support groups, including one for nurses.
- After returning from a back injury, she was cited for alleged deviations from protocol regarding administration of narcotics to patients,
 - ◊ E.g. not obtaining signatures for "wasting" surplus narcotics and failing to record administering morphine.
- Tested multiple times - always clean, yet employment was terminated.
- **Court:** Termination was pretext as experts testified she did not deviate from protocol.
 - ◊ Noted that patients had never been harmed while under her care.



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Title III Doctor Case – *Haas*

Haas v. Wyoming Valley Health Care Sys.,
465 F.Supp.2d 429 (M.D. Pa. Dec. 6, 2006).

- Surgeon with Schizotypal Personality Disorder experienced a "hypomanic" episode during his first surgery, a total knee replacement.
- The events of the episode were disputed –
 - ◊ Defendant claimed Dr. Haas "could not remember the names of surgical instruments and was unable to perform the surgery without assistance."
 - ◊ Dr. Haas asserted he was "thinking clearly and knew what he was doing, but that he was simply more jovial than usual..."
- Nevertheless, plaintiff thereafter went on voluntary leave and was admitted to a psychiatric hospital.



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Title III Doctor Case – *Haas*

- Despite two psychiatric opinions stating that plaintiff should be reinstated without restriction, reinstatement was refused.
- Hospital only offered to let him back if he agreed to retain a surgeon to supervise his surgeries.
 - ◊ Plaintiff tried to find one, but could not.
- **Court:** Reviewed the direct threat issue under Title III as plaintiff was an independent contractor.
- Termination improper as there were genuine issues of fact as to whether the risk to patient safety posed by Plaintiff was significant compared to that posed by average surgeon.



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Administrative Supervisor and "Code" Response – French

French v. Providence Everett Med. Ctr.,
2008 WL 4186538 (W.D. Wash. Sept. 8, 2008).

- Administrative supervisor with muscular dystrophy used arm braces and a scooter - began falling 2-4 times a week.
- Hospital placed her on medical leave and eventually fired her citing safety concerns, including inability to respond quickly to "codes."
- **Court:** Termination improper as plaintiff did not provide patient care during codes, only documented and analyzed the process.
 - ✦ Noted that hospital did not raise code issue at termination.



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Secretary with Decreasing Vision – EEOC v. Midwest



EEOC v. Midwest Division-RMC, LLC,
2006 WL 2164618 (W.D. Mo., July 31, 2006).

- Secretary in cardiac telemetry unit had decreasing vision.
- Patient-care duties including responding to call lights, inputting patient information, sorting medication, and transporting bodily fluids.
 - ✦ Employment terminated, citing safety concerns.
- **Court:** Defendant's summary judgment motion denied as it did not attempt reasonable accommodation to reduce any potential threat, as required by ADA.
 - ✦ Adaptive equipment, (e.g., magnification devices and a 20/20 pen), should have been attempted.



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Firefighter / EMT With a Pacemaker – McCann

McCann v. City of Eugene, 2011 WL 2490739 (D. Or. June 21, 2011).

- Firefighter / EMT used a pacemaker due to heart problems.
- Physician released her without limitations, but the City was concerned about interference with radio transmissions, and made her undergo a treadmill test with the radio running.
 - ✦ She passed easily, and was put back on duty.
- Test caused plaintiff anxiety, sleeplessness, & other problems.
- City cited a direct threat if she had a heart attack while responding to an emergency call.
- **Court:** Denied S/J to defendant as there are disputed issues of fact as to whether the City had a reasonable basis for believing there would be radio interference problems.



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Failure to Interview a Social Worker with Blindness – *Rojek*

Rojek v. Catholic Charities of Jackson, Inc.,
2010 WL 2232240 (E.D. Mich. May 27, 2010).

- Social worker was denied an interview for an open clinical therapist position with an outpatient mental health agency due to her blindness.
- Employer argued her blindness posed a direct threat to clients as therapists need to be able to pick up visual cues of abuse and neglect.
 - ◊ Also claimed no reasonable accommodations would help.
 - ◊ Plaintiff described 26 years of experience picking up non-visual cues.
- **Court:** S/J denied - Agency had no experience with blind therapists and based its judgments on stereotypes and misperceptions, not facts.
- Noted that agency did not even interview the applicant.
- **Note:** Decisions must be based on an individualized factual inquiry.



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Title III



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ADA ONLINE LEARNING

1. Pending DOJ Regs.: Accessible Medical Equipment
2. Legal Standing
3. Issues involving Patients Living With HIV
4. Effective Communication
5. Service Animal Access
6. Settlements

See *Great Lakes ADA Center Legal Brief, "Hot Topics in ADA Title III Litigation,"* and other briefs found at:
<http://www.adagreatlakes.org/Publications/#legalBrief>.



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DOJ / HHS Fact Sheet on Medical Care



- Access To Medical Care For Individuals With Mobility Disabilities – dated July 2010 and available at: http://www.ada.gov/medicare_mobility_ta/medicare_ta.htm
- Both Title II and Title III of the ADA and Section 504 require that medical care providers provide individuals with disabilities:
- Full and equal access to their health care services and facilities; and
- Reasonable modifications to policies, practices, and procedures when necessary to make health care services fully available to individuals with disabilities, unless the modifications would fundamentally alter the nature of the services (*i.e.* alter the essential nature of the services).



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DOJ / HHS Fact Sheet – Features of an Accessible Examination Room

- A clear floor space, 30" X 48" minimum, adjacent to the exam table and adjoining accessible route make it possible to do a side transfer.
- Adjustable height accessible exam table lowers for transfers.
- Providing space between table and wall for transferring.
- Accessible route and entryways are required.
- Connects to other accessible public and common use spaces.
- Maneuvering clearances are needed at the door to the room.
- Note: Additional clear floor space can be provided by moving or relocating chairs, trash cans, carts, and other items.



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DOJ Proposed Regulations

- **Proposed Rules on Nondiscrimination on the basis of Disability by State and Local Governments and Places of Public Accommodations; Equipment and Furniture, 75 Fed. Reg. 43452.**
Dated: July 26, 2010. Comments were due Jan. 24, 2011. Covers:
 - i. Medical Examination and Treatment Tables and Chairs
 - ii. Accessible Scales
 - iii. Radiological Diagnostic Equipment
 - iv. Lifts
 - v. Infusion Pumps
 - vi. Rehabilitation Equipment
 - vii. Ancillary Equipment
 - viii. Hospital Beds and Gurneys
 - ix. Medical Equipment Questions



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Background on Legal Standing

General Standing Requirements:

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

Title III Standing Requirements:

- Harm from lack of compliance that relates to disability.
- Must show a likelihood of future harm.
- Must show likely, rather than speculative plans to return.



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Legal Standing for Federal Jurisdiction – *Rojek*

McInnis-Misener v. Maine Medical Center, 319 F.3d 63 (1st Cir. 2003).

- A woman with rheumatoid arthritis who uses a wheelchair was planning on having a child although she was not yet pregnant.
- Filed suit as the hospital nearest to her did not have wheelchair accessible rooms in the after-birth recovery area.
- **Court:** She did not have legal standing as the case was not ripe.
- Many contingencies may prevent a controversy from occurring:
 - She may not become pregnant, may use a different hospital, delivery complications might prevent her from going to the after-birth recovery room (which is what happened the last time she gave birth).
- Stated that there was no hardship on plaintiff as she could wait until she's pregnant before bringing a lawsuit.



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Another Case and then Time to Vote



Chambers v. Melmed, 141 Fed.Appx. 718 (10th Cir. 2005).

- A woman who was blind brought suit as she was denied insemination treatments.
- **Court:** No standing - no likelihood of future harm.
 - Plaintiff had moved and the doctor had stopped offering artificial insemination services.
- **Query:** In the earlier case, do you agree that it was not a hardship on Ms. McInnis-Meisnor to require that she file suit only after becoming pregnant?
- **Please Vote:** A. Yes B. No



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Plaintiff with Standing – Rose

Rose v. Cahee, 727 F.Supp.2d 728 (E.D.Wis. 2010).

- A prisoner was denied gallbladder surgery because she was living with HIV.
- She was released from prison after bringing suit and lived 80 miles away from the clinic that refused to treat her.
- **Court:** Examine standing at the time she filed suit.
 - ◊ Plaintiff had standing against the Dr. and clinic as returning was possible at the time she filed suit.
 - ◊ Claim against the religious organization that owns the clinic was dismissed due to the ADA's religious exemption.
 - ◊ Suit against clinic goes forward as clinic was operated by a non-religious board.



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Plaintiff with Standing – Benavides

Benavides v. Laredo Med. Cntr.,
2009 WL 1755004 (S.D.Tex., June 18, 2009).

- A man with a heart condition who is deaf was admitted to Laredo Medical Center "because of severe coughing and a fluttering heart."
- Upon arrival, he requested a sign-language interpreter, but this was not provided.
 - ◊ Instead, two nurses attempted to communicate with him through written notes, one in English and one in Spanish.
- Claimed that written notes were not effective "due to the complexity of the information, [...his] limited reading capacity," and the fact that he did not understand Spanish.



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Plaintiff with Standing – Benavides



- Decisions about condition & treatment were made while he was "completely unaware of what was happening to him."
- **Court:** Examined the following factors: plaintiff's proximity to the hospital, the number of prior visits, whether his medical condition would likely require attention in the future, and whether the hospital has changed its policy to provide accommodations in the future.
- **Holding:** Plaintiff had standing to bring suit.
 - ◊ Hospital's bare statement that it would provide accommodations in the future was insufficient.
 - ◊ Claim for monetary damages under Section 504 could proceed.



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Patients Living With HIV – *Bragdon*

Bragdon v. Abbott, 524 U.S. 624 (1998).

- **U.S. Supreme Court:** A dentist's refusal to treat a patient due to her positive HIV status violated the ADA.
- Analyzed the case using a direct threat analysis and found that the dentist's decision to refuse treatment was not objectively reasonable.
 - ◊ Even though the dentist claimed to be an expert acting on a good faith belief of a significant risk of harm.
 - ◊ No outside evidence was offered by the dentist to support his assertion.



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Patients Living With HIV – *Doe*

Doe v. Div. of Youth and Family Serv., 148 F.Supp.2d 462 (D.N.J. 2001).

- Plaintiff living with HIV gave birth at Capital Health System.
- Hospital set up an emergency guardianship over the newly born child and contacted the police to prevent the mother from leaving the hospital with her child.
- Also disclosed her HIV status to family members and the police.
- Refused to give mother medication orally.
- Child was administered AZT without the mother's permission.
 - ◊ Later discovered that the baby was not HIV positive.
- **Court:** Actions may ADA and Rehabilitation Act.
 - ◊ However, no individual liability for medical staff.



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Effective Communication – *Constance*

Constance v. State of New York Health Science Center at Syracuse,
166 F.Supp.2d 663 (N.D. N.Y. 2001).

- Hospital tried unsuccessfully to secure an ASL interpreter for an emergency room patient and her husband who were both deaf.
- **Court:** As the hospital made a good faith attempt to obtain an interpreter, the court held that it did not violate the ADA or Rehabilitation Act.
- No injunctive relief as plaintiff did not plan to return to the hospital.
- **Query:** Given the advances in technology allowing for remote interpreters, the case may be decided differently today?



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Effective Communication – *Majocha*

Majocha v. Turner, 166 F.Supp.2d 316 (W.D. Pa. 2001).

- Individual who is deaf requested an interpreter when speaking with an ENT specialist about his infant son.
- Dr.'s office wanted to write notes instead.
- Dr. sent a letter saying appointment was cancelled, "we feel we cannot meet your needs in caring for your child."
- Dr. claimed "note taking" is listed as an example of acceptable auxiliary aids.
- **Court:** Summary judgment denied as a genuine issue of fact existed as to whether note taking could be considered an effective form of communication in the health care setting.



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Effective Communication – *Loeffler*

Loeffler v. Staten Island University Hosp.,
582 F.3d 268 (2nd Cir. 2009).

- Hospital refused to provide an interpreter to a heart-surgery patient and his wife, both of whom were deaf.
 - ◊ Began requesting interpreters weeks before admission.
 - ◊ Hospital used plaintiffs' minor children (aged 13 & 17) to interpret.
- In Recovery Room, Bobby (age 13) stated he did not "feel comfortable [and did not] understand some of the terms," but the Dr. laughed it off, telling Bobby that he was doing fine.
- Patient then suffered a stroke, grabbing his ankle and writhing in pain.
- Bobby alerted a nearby nurse, who responded with indifference and opined that "that was how deaf people communicate," saying, "what do you know, you're a kid."



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Effective Communication – *Loeffler's Facts*

- Bobby raised a disturbance for 2-5 minutes until Dr. returned.
- Bobby then interpreted to mom that his dad had a stroke and needed more surgery.
 - ◊ **Bobby:** Interpreting was "amazingly overwhelming," he did not "know what a stroke was."
- Children served as interpreters for next two weeks, missing school.
- Both children claim to have "suffered depression as a result of their father's stroke, and the role they performed in relaying medical information" and failing to help their father.
- At that point, the family filed a lawsuit and the hospital began to provide an interpreter.



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Effective Communication – Loeffler Facts

- **District Court:** Granted summary judgment to the hospital.
- **Appellate Court:** Reversed the district court and held that the hospital may have acted with "deliberate indifference" in denying family requests for an interpreter and TTY.
 - ✦ Hospital policy required an interpreter in this situation.
- Money damages may be available under the Rehabilitation Act.
- Children also had a Rehab. Act claim.
- A negligence claim against the doctor was also able to proceed.
- **Sad Note:** Mr. Loeffler died while the case was pending.
- **Query:** Can passing notes ever be effective for a patient who is deaf?
- **Please Vote:** A. Yes B. No



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DOJ Settlements in Communication Cases

- DOJ has entered into many settlements with health care providers that are available at <http://www.ada.gov/settlemt.htm>. Generally, relief includes:
- Providing appropriate auxiliary aids free of charge, including sign language interpreters, within a specific time frame;
 - Having staff trained on policies and auxiliary aids, including how to set-up and operate Video Remote Interpreting services for dealing with emergencies;
 - Giving notice to the community and the hospital's personnel regarding policies, including posting notices;
 - Prohibiting the use of family members or other unqualified people to interpret;
 - Developing effective complaint resolution mechanisms;
 - Requiring up-to-date lists of interpreters;
 - Providing captioned television and videos;
 - Paying monetary damages and fines.



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Service Animals in Hospitals: Recent DOJ Guidance



- DOJ commentary from the recent ADA Regulations follows the guidance of the Centers for Disease Control and Prevention (CDC).
 - Access should be allowed in almost all areas: admissions & discharge offices, E/R, inpatient & outpatient rooms, examining & diagnostic rooms, clinics, rehabilitation therapy areas, cafeteria & vending, restrooms, pharmacy, and all other areas where people are permitted without added precautions.
 - ✦ Possible exceptions: Operating rooms and burn units
- See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 CFR Part 36 at page 56272;
- CDC Guidelines for Environmental Infection Control in Health-Care Facilities, available at: http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf.



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Service Animal Tasks In the Healthcare Context



Service animals may be required to perform the following tasks:

- Pulling a wheelchair;
 - Assisting an individual during a seizure;
 - Alerting individuals to the presence of allergens;
 - Retrieving items such as medicine or the telephone;
 - Providing physical support and assistance with balance and stability to individuals with mobility disabilities; and
 - Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.
- See Comments to 28 CFR Part 36 at Page 56266.

Service Animals – Roe

Roe v. Prov. Health Sys.-Oregon, 655 F. Supp. 2d 1164 (D. OR 2009).

- Person's service dog with a "putrid odor" resulting in patient transfers.
- The dog's size and growling response made it difficult for staff to treat patient and a handler was not always available.
 - ✦ Dog may have had an infection as well.
- Hospital offered a compromise by requesting that patient close her door when the dog was present and offered to provide a HEPA filter
 - ✦ Plaintiff refused this offer.
- **Court:** It was a direct threat to allow access for the service animal.
- Dismissed Plaintiff's case and enjoined her from bringing any service animal to the hospital if she returned.
 - ✦ Court noted hospital's history of accommodating service animals.

Service Animals – Smith

Smith v. Moorman,

2002 WL 31182451 (6th Cir. Sept. 20, 2002).

- **Court:** VA Medical Center did not discriminate by refusing the veteran's request to keep his dog with him during the veteran's hospitalization.
 - ✦ Without much elaboration, the court found that Smith received medical treatment and his disability played no part in the Medical Center's decision to prohibit the dog from staying.

Service Animals – Sheely



Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (7th Cir. 2007).

- MRI facility prevented an individual with blindness from bringing her service dog into the MRI suite during her son's appt., citing space concerns, safety issues, & the need to keep out metal objects.
- Modified its no-animal policy 9 months after suit was filed, allowing access with a few specific exceptions.
- **Court:** Defendant may have violated ADA - Plaintiff's suit was not moot.
- Defendant has a high burden to establish that the challenged conduct cannot reasonably be expected to start up again.
- Not enough to simply say that it does not intend to start that behavior again.
- Court could not "say with any degree of confidence, let alone with absolute clarity," that defendant would not engage in the same conduct in the future.
- **Note:** Demonstrates the association provision of the ADA.



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January 3, 2012 – HHS/OCR Service Animal Settlement

- U.S. Department of Health and Human Services Office of Civil Rights (HHS/OCR) entered into a settlement in a service animal agreement under Section 504 of the Rehabilitation Act.
- Individual with a spinal disability requires a service animal to assist him in a number of daily functions, including carrying and picking up items and helping to stabilize his walking.
- He was denied admission to St. Edward Mercy Medical Center, as his service animal was not a "seeing eye dog" and he could not provide vaccination records or tags verifying the health of the animal.
- **HHS/OCR:** Mercy's policies and procedures regarding access to service animals inappropriately excluded service animals.
- **Press release:** <http://www.hhs.gov/news/press/2012pres/01/20120103a.html>.



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Other Settlements - DOJ

There are several DOJ settlements involving other Title III issues in healthcare services, found at:
<http://www.ada.gov/settlemt.htm>.

- In *U.S. v. Ashfaq*, a woman in a wheelchair had difficulty getting onto examination table for yearly checkup.
- She requested that Dr. Ashfaq purchase a lift or adjustable table, which the doctor refused citing budget constraints.
- Dr. Ashfaq also stated she would no longer provide medical care to the patient.



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Other Settlements - DOJ

- Dr. Ashfaq agreed to settle the case and to:
 1. Purchase one adjustable exam table;
 2. Adopt a non-discrimination policy and post it in her office;
 3. When scheduling an appointment, Dr. Ashfaq's staff will ask the patient if he or she will need any special assistance, policy modifications, or auxiliary aids or services at the examination because of a disability;
 4. Attend a training session on ADA Title III with her staff;
 5. Pay damages to the complainant of \$1,000;
 6. Report to DOJ to ensure compliance.

Settlement Agreement of US and Ashfaq, found at:
http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_settlements/ca/ca_3.php.



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Other Settlements - DOJ

- In a case involving access for plasma donors with sensory impairments, DOJ entered into a wide ranging agreement with Bio-Medics providing that Bio-Medics adopt, post, and train staff regarding policies that require, in part:

1. Having staff work with an individual one-on-one to make sure they are acclimated to, and comfortable in, the facility;
2. Deferring to donor preferences for reasonable accommodations;
3. Providing detailed visual descriptions for individuals who are blind or who have visual impairments;
4. Utilizing sign language interpreters or other auxiliary aids to fully explain documents to people who are deaf or hard of hearing – the method for providing effective communication is spelled out in detail.

US and Bio-Medics Agreement at: <http://www.ada.gov/bio-medics.htm>.



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Other Settlements – Structured Negotiations

- Private parties have also achieved settlements utilizing structured negotiations, a collaborative and solution-driven advocacy and dispute resolution method conducted without litigation.
- For over fifteen years, Lainey Feingold, a private attorney in California has used Structured Negotiations to increase accessibility, including access to technology and information.
- Structured negotiations have achieved systemic solutions regarding accessibility at healthcare providers across the country, including agreements with the University of California San Francisco Medical Center, Massachusetts General Hospital, and Brigham & Women's Hospital in Boston.



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Other Settlements – Structured Negotiations

- Also, Structured Negotiations have been used in recognition of the growing importance of accessible health care information to people with visual impairments.
- Through Structured Negotiations, the American Cancer Society (ACS) has agreed to design and generate its website in accordance to well accepted web accessibility standards.
 - ACS also agreed to undertake a pilot program for making its print materials available in alternative formats including Braille, Large Print, audio and electronic formats.

For more information about Structured Negotiations and the agreements referenced in this brief go to:

www.lflegal.com/category/settlements/accessible-health-care-settlements.



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Barrier Free Healthcare Initiative

- A group of disability rights lawyers and advocates has announced the creation of The Barrier Free Healthcare Initiative, a collaborative effort to support legal and policy initiatives aimed at eliminating the physical and programmatic barriers that people with disabilities face in obtaining healthcare. For more information on this new initiative go to: www.thebarrierfreehealthcareinitiative.org.



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Other Settlements – Disability Rights Advocates

- A non-profit organization, Disability Rights Advocates (DRA), has entered into several settlements with healthcare providers in cases filed under state and federal law. More information about these important settlements can be found at: http://www.drakelegal.org/cases/health_insurance/index.php.
- Of particular importance is the case of *Metzler v. Kaiser* in March 2011. The DRA press release notes that, "Studies have shown that women with severe disabilities get half as many mammograms and pap smears as women without disabilities. Although accessible mammography equipment exists, very few providers use them."





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Practical Tips






Practical Tips for Employers / Healthcare Providers




- Offer periodic ADA training, including new hires.
- Do an individualized inquiry every time.
- Use the best available objective medical and scientific evidence to support direct threat defenses.
- Fully engage in interactive process.
 - Request limited additional information if the disability or need for accommodation is not known or apparent. (Use Medical Releases)
- Formulate, provide staff training, & enforce policies on:** reasonable accommodations, direct threat, public access, and other related issues.
- Document:** Reasonable accommodation efforts, relevant facts, job duties, performance issues, undue hardship / burden.




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Practical Tips for Employees / Patients



- Requests for reasonable accommodations should identify the impairment, limitations, & accommodation preference, if known
- Document:** Reasonable accommodation requests, relevant discussions, harassment, retaliation, disparate treatment, denials of access.
- Know and follow procedures, policies, and workplace conduct rules.
- Provide medical information when appropriate.
- Personnel Files:** Feel free to add information or request a copy.
- While service animal identification cannot be required, it may be helpful to have information available.
- Provide detailed information on requested auxiliary aids, if possible.



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General ADA Resources






- **National Network of ADA Centers:** www.adata.org; 800/949-4232(V/TTY)
- **Equal Employment Opportunity Commission:** www.eeoc.gov
- **Equip For Equality:** www.equipforequality.org; 800/537-2632 (Voice); 800/610-2779 (TTY)
- **Job Accommodation Network:** <http://askjan.org>
- **U.S. Department of Justice, ADA Info:** www.ada.gov
- **U.S. Dept. of Health & Human Services:** www.hhs.gov

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Continuing Legal Education Credit for Illinois Attorneys

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

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Thank you for Participating In Today's Session

Please join us for the next session in this series:
March 21, 2012

Olmsstead Planning: Litigation, Collaboration and the All Important Financial Calculation

Speaker: Talley Wells, Attorney and Director of the Mental Health and Disability Rights Project Atlanta Legal Aid Society




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The End

The ADA in the Healthcare Setting

January 18, 2012

Presented by: Barry Taylor, Legal Advocacy Director and Alan Goldstein, Senior Attorney, Equip for Equality

Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability of Rehabilitation and Research Award No.H133A110029.


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