ADA AUDIO Conference
ADA National Network

ADA Audio Conference Series
November 13, 2012

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

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ADA Case Law Update

ADA Audio Conference
ADA National Network
November 13, 2012
Barry C. Taylor
Alan Goldstein
Equip for Equality

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

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Overview: Title I Issues to be Discussed

1. ADA Amendments Act
2. Reasonable Accommodation
3. Qualified/Essential Functions
4. Medical Inquiries and Examinations
5. Disability Harassment
6. Ministerial Exception

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Overview: Title II and III Issues to be Discussed

1. Education
2. Professional Licensing
3. Public Services
4. Community Integration
5. Criminal Justice
6. Transportation
7. Voting
8. Public Accommodation Access
9. Standing to Sue

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Recent Litigation under the ADA Amendments Act

ADAAA: Definition of Disability
+
ADA: Reasonable Accommodation and Nondiscrimination
= ADA as Amended

7

Courts Continue to Agree Congress Broadened the Definition of Disability

Estate of Murray v. UHS of Fairmount, Inc.,
2011 WL 5449364 (E.D. Pa. Nov. 10, 2011)

Allowed case to continue although record of substantial limitation of depression was "incredibly sparce" because of ADAAA's command to interpret definition of disability broadly.

Kravits v. Shinseki,
2012 WL 604169 (W.D. Pa. Feb. 24, 2012)

Focus should be on whether covered entitles have complied with their obligations, and "whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

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Case Taking a More Restrictive Approach

***Allen v. SouthCrest Hosp.*,**
2011 WL 6394472 (10th Cir. Dec. 21, 2011)

- Court rejected plaintiff's argument that she was substantially limited in working under the ADAAA because her migraines did not substantially limit her in a "class or broad range of jobs."
  - Argument concerning impact of migraine headaches on sleeping was insufficiently developed below and mentioned only in passing on appeal, so the court refused to consider it.
  - However, evidence showed migraines—when active and treated with medication—did not permit her to perform activities to care for herself in the evenings and compelled her to go to sleep instead.
  - The court found this point was too conclusory.
- **Tip:** Safest to provide as much specific information as possible on how impairment substantially limits major life activity.

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Courts Broadly Interpret Substantial Limitation

Eldredge v. City of St. Paul,
2011 WL 3609399 (D. Minn. Aug. 15, 2011)

Plaintiff with permanent, progressive eye disease causing small blind spot negatively impacting central visual acuity was substantially limited in seeing.

***Barlow v. Walgreen Co.*,**
2012 WL 868807 (M.D. Fla. Mar. 14, 2012)

Court found that plaintiff with musculoskeletal impairment was covered under ADAAA because "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."

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Courts Finding Episodic Impairments Can Be Substantially Limiting

Molina v. DSI Renal, Inc.
2012 WL 29348 (W.D. Tex. Jan. 4, 2012)

Court finds that back impairment where pain is variable would be covered under the ADAAA if substantially limiting when active.

Katz v. Adecco USA, Inc.
2012 WL 78156 (N.D.N.Y. Jan. 10, 2012)

Job applicant not hired after identifying as a breast cancer survivor. Court finds that after the ADAAA, it does not matter that her cancer was in remission at the time of the alleged discrimination.

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Cases interpreting "regarded as" under the ADAAA

Wells v. Cincinnati Children's Hospital Medical Center,
2012 WL 510913 (S.D. Ohio Feb. 15, 2012)

Plaintiff "no longer is required to prove that the employer regarded her impairment as substantially limiting a major life activity."

Dube v. Texas Health and Human Services Com'n,
2011 WL 3902762 (W.D. Tex. Sept. 6, 2011)

"Defendant relies upon cases applying the much narrower, pre-ADAAA definition of "regarded as" disabled, which are not relevant."

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Recent Litigation on Reasonable Accommodation

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Interactive Process: Lack of good faith by employer

Cox v. Wal-Mart Stores Inc., 441 Fed. Appx. 547 (9th Cir. 2011)

- Employee sought reasonable accommodations when returning from leave following an injury at work.
- Wal-Mart rejected the request as she did not file the correct form, but Wal-Mart did not advise her of the error.
- Wal-Mart also refused to extend the 5-day deadline for submitting paperwork when the employee had to respond to a court subpoena.
- **Court:** Reasonable jury could find that Wal-Mart failed to engage in the interactive process in good faith.

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Interactive Process: Failure not fatal to employer

Valdez v. McGill, 2012 WL 432635 (10th Cir. 2012)

- Employee with cancer alleged that employer failed to engage in interactive process regarding his request for additional leave.
- **Court:** In light of his diagnosis with colon cancer, his frequent absences, and his inability to return to work according to earlier physician's note, it was uncertain employee would be able to return to work on date proposed in request for additional leave.
  - Under the ADA, an employer is not required to engage an employee in a futile interactive process.
- **See also: *Fisher v. Vizioncore, Inc.***, 429 Fed.Appx. 613 (7th Cir. 2011) Employee failed to show that even if employer engaged in interactive process that there was an effective accommodation.

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Reassignment as a Reasonable Accommodation

EEOC v. United Airlines,
2012 WL 3871503 (7th Cir. Sept. 7, 2012)

- **Background:** United had a policy that employees with disabilities who could no longer do the essential function of their current jobs, could only compete for open positions as a reasonable accommodation, but were not entitled to the position.
- **7th Circuit 3 Judge Panel:** Under existing precedent, reassignment to a vacant position was not required.
- **Full 7th Circuit:** In light of the Supreme Court's decision in ***Barnett v. U.S. Airways,*** the ADA mandates that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship.

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Transfer for Medical Reasons as a Reasonable Accommodation

Sanchez v. Vilsack, 2012 WL 4096250 (10th Cir. Sept. 19, 2012)

- **Background:** employee sustained brain damage after falling at work.
- She requested transfer to location where she could obtain better medical treatment.
- Employer denied request arguing that a transfer is not required when the employee can perform her current job's essential functions.
- **10th Circuit:** A transfer accommodation for medical care or treatment is **not** per se unreasonable, even if an employee is able to perform the essential functions of her current job without it.
  - Analogized the plaintiff's case to the EEOC's interpretive regulations and the Court's own decisions on leaves of absence as a reasonable accommodation.

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Reasonable Accommodation – Dividing Tasks Among a Crew

Miller v. Ill. Dep't of Transportation,
643 F.3d 190 (7th Cir. 2011)

- Plaintiff, a highway maintainer on a bridge crew, alleged that his employer refused his request not to work at high heights in exposed positions as reasonable accommodation for his acrophobia.
- **Court:** Plaintiff's case can proceed. Evidence demonstrated that the employer had informally provided the requested accommodation by allowing other crew members to perform non-essential tasks when plaintiff could not do so.
- These past "accommodations" undercut the employer's argument that the plaintiff's request was unreasonable.

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No Reasonable Accommodation to Meet Job Qualification Standard

Johnson v. Bd. of Trustees of Boundary County Sch. Dist. No.101, 2011 WL 6091313 (9th Cir. 2011)

- **Background:** Teacher sought an accommodation of being permitted to teach despite not having a current teaching certificate.
- **Court:** Reasonable accommodations are not required to allow an employee to meet job prerequisites, *i.e.*, qualification standards.

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Recent Litigation on Qualified/Essential Functions

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Rotating Shifts as an Essential Function

Feldman v. Olin Corp., No. 10-3955 (7th Cir. Aug. 27, 2012)

- **Background:** Plaintiff with fibromyalgia and sleep apnea sought reasonable accommodation of working day shift and not having to rotate shifts and work overtime.
- **Court:** Record contained triable question as to whether plaintiff was disabled under ADA where plaintiff presented medical testimony demonstrating gravity of his sleep apnea condition that required change in his working schedule.
- Court also found existence of triable question as to whether working overtime and rotating shifts were essential functions of plaintiff's current job or any job to which plaintiff sought transfer.

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Rotating Shifts as an Essential Function

Kallail v.Alliant Energy Corp. Serv., Inc., 691 F.3d 925 (8th Cir. 2012)

- **Background:** Employee's Resource Coordinator with diabetes sought reasonable accommodation of not working rotating shifts.
  - Rotating shifts allowed the employer to provide 24/7 coverage.
- **Court:** Working rotating shifts is an essential function of the resource coordinator position.
  - Other facilities where this was permitted provided different services.
  - Accommodation would require other employees to work more night and weekend shifts may not be reasonable if it causes complaints and effects morale.

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Essential Functions: Licensing

Rosenbrough v. Buckeye Valley High School,
2012 WL 31942269 (6th Cir. Aug. 8, 2012)

- **Background:** Employee, who was born without a hand, was training to be a school bus driver.
  - A Commercial Driver's License (CDL) was not required to drive the school bus.
  - Part of the training was to schedule employee for the CDL exam, but employer refused to schedule her and made derogatory remarks.
- **District Court:** Employee not qualified because she lacked a CDL
- **6th Circuit Court of Appeals:** There can be no logical basis for requiring her to have a CDL to be "otherwise qualified" for the position of training to obtain a CDL. Not having a CDL was not necessary for employee to perform the essential functions of her training position.

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Recent Litigation on Medical Inquiries/Examinations

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Mental Health Examinations and the ADA

Kroll v. White Lake Ambulance Authority, 691 F.3d 809 (6th Cir. 2012)

- Employee required to obtain & pay for psychological counseling.
  - Employee refused to do so and was fired.
  - Claimed counseling is a medical exam under the ADA and that her termination was in retaliation for her refusal to undergo counseling.
- **District court:** Psychological counseling is not a medical examination and therefore the ADA was not applicable.
- **6th Circuit:** Mandated counseling could be a seen as an attempt to uncover "mental health defects," and therefore is a medical examination.
  - Employer could still show that the medical examination was job related and consistent with business necessity and therefore lawful.

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Medical Information and Employee Wellness Programs

Seff v. Broward County, 691 F.3d 1221(11th Cir. 2012)

- Employee brought class action alleging County's wellness program violated the ADA by requiring participating employees to undergo medical examinations and answer certain medical inquiries.
- Employees who did not participate were charged $20 a week.
- Information gathered from exams and questionnaire was used to identify employees who had one of five diseases.
- **Court:** No violation of the ADA. Wellness program was a "term" of the group health plan, which fell under the ADA's "safe harbor" provision.

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Medical Inquiries and Examinations: DOJ Settlement

Justice Department Settles Lawsuit Against Baltimore County, Maryland for Improper Medical Exams

- 10 current and former police officers, firefighters, EMTs, civilian employees and applicants were allegedly subjected to inappropriate and intrusive medical examinations and/or other discrimination.
- County required to: pay $475,000 plus benefits; adopt new policies and procedures; refrain from using the services of the medical examiner who conducted the overbroad medical examinations in question; cease the automatic exclusion of job applicants who have insulin-dependent diabetes mellitus; and provide ADA training to all current supervisory employees and all employees who participate in making personnel decisions.
- See: http://www.justice.gov/opa/pr/2012/August/12-crt-982.html

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Medical Information and Direct Threat

Sanders v. Illinois DCMS,
2012 WL 549325 (C.D. Ill. Feb. 21, 2012)

- Employee required to undergo medical examination after he supposedly made threats in the workplace.
- It was later determined that the threats were unfounded.
- Employer still required a medical examination.
- Employee sued under ADA for improper medical examination and employer raised direct threat defense.
- **Court:** Employee's case can proceed as there is a question of fact whether the business necessity for the examination still existed.

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Recent Litigation on Disability Harassment

See Legal Brief on Harassment and other topics at the Great Lakes ADA Center:
http://www.adagreatlakes.org/Publications/#legalBrief

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Legal Standard for Disability Harassment

5 Factors in Disability Harassment Claims:

1. Plaintiff is a qualified individual with a disability
2. Plaintiff was subjected to unwelcome harassment
3. The harassment was based on plaintiff's disability
4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment, and
5. Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action)

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Recent Disability Harassment Case

Davis v. Vermont, Dept. of Corrections, 2012 WL 1269123 (D. Vt. Apr. 16, 2012)

- A prison guard injured his groin and testicles at work.
- During his recovery leave, his supervisors sent two, staff-wide offensive emails containing pictures that referenced the guard's injury.
  - One of the emails contained a picture of an individual with his testicles showing, with Davis's face superimposed on the individual.
  - Staff and inmates saw copies of these emails.
- When he returned from leave
  - He received a note in his mailbox stated "how's your nuts/kill yourself/your done."
  - He also he received an email with a cartoon of a person with a gun to his head, captioned "kill yourself."
  - Ridiculed by prisoners who grabbed their testicles and made comments like "good luck making kids with that package."

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Recent Disability Harassment Case *Davis v. Vermont DOC* (cont'd)

- **Court:** Incidents were sporadic but severe.
- Conduct could constitute disability harassment - it was perpetuated by his supervisors and it interfered with an essential function of his job.
- Prison guards must rely on their co-workers to stay safe and this was compromised when the plaintiff was ostracized.
- Furthermore, courts have generally held that prison officials are not responsible for the conduct of inmates.
  - However, in this case the inmates would not have known about the guard's disability if it had not been for his supervisors disclosing the injury.
  - The court compared the situation to an employer tolerating sexual harassment.

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Other Recent Disability Harassment/Constructive Discharge Cases

***Schwarzkopf v. Brunswick Corp.*, 833 F. Supp. 2d 1106 (D. Minn. 2011)**

Court allowed the hostile work environment claim of an employee with depression and anxiety disorder to move forward because it found he was subjected to a significant number of negative comments related to his disability, often in the presence of co-workers. A reasonable jury could find that the adverse treatment he endured was sufficiently severe and pervasive to constitute harassment based on disability.

***McKelvey v. Department of Defense*, 450 Fed. Appx. 532 (6th Cir. 2011)**

The 6th Circuit Court of Appeals held that ongoing taunting and derogatory name calling over a nine month period of a soldier who lost his hand in battle could amount to a constructive discharge claim. The court also held that reinstatement, rather than front pay, is the favored equitable remedy for constructive discharge.

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Recent Litigation on the ADA and the Ministerial Exception

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Ministerial Exception

***Hosanna-Tabor v. EEOC*, 132 S.Ct. 694 (2012)**

- **General Rule:** Courts have recognized a "ministerial exemption" grounded in the First Amendment to preclude the application of nondiscrimination in employment laws to claims concerning the relationship between a religious institution and its ministers.
- **Facts:** Employee was a teacher at an elementary school operated by the Lutheran Church. She initially worked as a lay teacher but then went through a process to become a "called" teacher.
  - She taught math, language arts, social studies, science, gym, art and music.
  - She also led a religion class 4 days a week, led students in prayer and devotional exercises each day, attended a weekly school-wide chapel service, and led the chapel service herself twice a year.

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Ministerial Exception – *Hosana-Tabor*

- She look a medical leave, but when she tried to return to work, she was told her position was filled and that the school did not believe she was ready to return to the classroom. She told the school she had spoken to an attorney and intended to assert her legal rights and was terminated soon thereafter. The EEOC sued under the ADA.
- **District Court:** Dismissed the case under the ministerial exception.
- **6th Circuit:** Reversed – ministerial exception does not apply because her duties were identical to a lay teacher.
- **Supreme Court:** Employee falls under the ministerial exemption - she underwent specific religious training and a commissioning process, she and the school held her out as a minister, and her duties reflected the role of conveying the Church's message.

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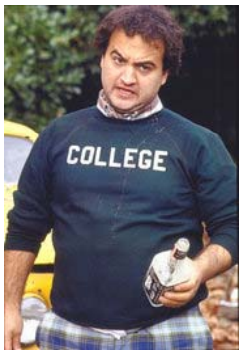
Recent Litigation on the ADA and Education



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Education Case: Failure to Accommodate and Unequal Treatment

***Johnson v. Washington County Career Center*,**

2012 WL 975071 (6th Cir. Mar. 23, 2012)

- Student with learning disabilities sought accommodations for a surgical technician program, but the school failed to provide the previously promised accommodations.
- Also student was unable to attend classes, (her lung condition prevented her from attending classes in room accessible only by stairs), and she was dismissed from the program for violating the attendance policy.
- **6th Circuit:** Reversed summary judgment - sufficient evidence that school failed to provide accommodations and enforced attendance policy against her that had not been enforced against students without disabilities.

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More Education Cases: *Argenyi*

Argenyi v. Creighton Univ.,
2011 WL 4431177 (D. Neb. Sept 22, 2011)

- Student who used a hearing aid requested CART and interpreters from the medical school.
  - Used the same accommodations as an undergrad.
- School provided note-takers, front-row seating, and electronic versions of materials, but not CART or interps.
- Student borrowed money to pay for CART and interpreters and sued.
- **Court:** Summary judgment for the university as the accommodations provided were sufficient.

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More Education Cases: DOJ Settlement

DOJ Settlement against Milton Hershey School

- School that refused to enroll a student w/ HIV must pay $700,000 in damages.
- School also adopted a non-discrimination policy and staff and administration will undergo training on the ADA
- More information can be found at: http://www.justice.gov/opa/pr/2012/September/12-crt-1102.html

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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,
630 F.3d 1153 (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)**
- **Upon Remand Court Granted Summary Judgment for Plaintiff** ***See* 823 F. Supp. 2d 995 (N.D. Cal. 2011).** The court found:
  - All of plaintiff's witnesses were qualified as experts and their testimony that plaintiff needed the accommodations were admissible.
  - Providing the plaintiff with the requested accommodations would not pose an undue burden on the NCBE.

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DOJ Intervenes in Class Action Against Law School Admissions Council

The Department of Fair Employment and Housing v. LSAC, Inc.,
CV 12-1830-EMC (N.D. Cal. 2012)

- Class action was brought on behalf of people with disabilities in California who had been denied testing accommodations by the Law School Admissions Council.
- On October 18, 2012, the DOJ was allowed to intervene in the case, which expands the case to a nationwide pattern or practice lawsuit.
- Allegations in the lawsuit include:
  - systemic failure to provide testing accommodations
  - discriminatory policies that result in denials of routine and well-supported accommodation requests
  - "flagging" test scores that involve testing accommodations that result in identifying that certain test takers have disabilities.

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Recent Litigation on the ADA and Public Services

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Medical Marijuana and the ADA

James v. City of Costa Mesa, 684 F.3d 825 (9th Cir. 2012)

- Plaintiffs are disabled women whose doctors had prescribed marijuana for their pain. State laws allowed the use of medicinal marijuana, but federal law did not. Two cities moved to shut down collectives distributing medicinal marijuana and the plaintiffs filed suit under Title II of the ADA.
- **Court:** Doctor-supervised marijuana use was federally prohibited and use of drugs was not covered by ADA's supervised use exception.
- Medical marijuana use did not come within ADA exception for drug use "authorized by other provisions of federal law".
  - Plaintiff argued that Congress allows the District of Columbia to have the exception, but the court found this was not an authorization under federal law.

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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 – Sheltered Workshops Covered

Lane v. Kitzhaber,
841 F. Supp. 2d 1199, (D. Ore. 2012)

- Suit was filed on behalf of eight people with intellectual disabilities who are able to work in an integrated employment setting, but are in segregated workshops.
- **Court:** Plaintiffs have valid claims under Title II of the ADA and the integration mandate applies to the provision of employment-related services
- Recently, the court entered another order certifying the case as a class action.

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Recent Community Integration Decisions – Development Disability Centers

U.S. v. Virginia,

No. 3:12-cv-00059-JAG (E.D. Va. 2012)

- DOJ conducted investigation and filed suit against the State of Virginia regarding the 2900 people with intellectual disabilities living in state-operated institutions.
- An agreement was reached between DOJ and the State, but a group representing parents of institutional residents opposed the agreement.
- On August 23, 2012, the agreement was approved by the court.

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Recent Community Integration Decisions – Development Disability Institutions

U.S. v. Virginia (cont'd)

Under the Agreement, the State of Virginia will create:

- 4200 new home and community based waivers for adults and children on waiting lists for community services
- An "Employment First" policy, to prioritize and expand meaningful work opportunities for people with intellectual disabilities.
- Housing assistance fund to facilitate independent living for people with intellectual disabilities.
- A comprehensive quality and risk management system to ensure that community-based services are safe and effective
- A comprehensive community crisis system to divert people from unnecessary institutionalization

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Recent Community Integration Decisions – People Living in Nursing Homes

Colbert v. Quinn, 07 C 0747 (N.D. Ill. 2011)

- A class action was brought against Illinois state officials on behalf of approximately 16,000 people with physical disabilities and/or mental illness living in nursing homes in Cook County, Illinois
- On December 20, 2011, a comprehensive Consent Decree was entered by the judge, which will allow qualified nursing home residents the opportunity to move into the community and receive the supports they need to be successful.

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Colbert v. Quinn (cont'd)

Terms of the Consent Decree:

- In the first 30 months, the State will provide housing assistance so that 1,000 people with disabilities in Cook Co. nursing homes can move into the community.
- After the first 30 months, the State will implement a comprehensive plan to move the remaining members of the class into the community based on data collected during the first phase of the agreement.
- The State will develop housing and community-based services for class members moving into the community.
- The court appointed an independent monitor with expertise in the development and implementation of community-based services for people with mental illness and physical disabilities.

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Other Settlements in Community Integration Litigation

- ***Darling v. Douglas* -** Final Settlement Approved Requiring California to Provide Appropriate Community-Based Adult Home Care
- ***Dykes v. Dudek*** - Florida Agrees to Settle P&A Suit on Behalf of Individuals on the DD Medicaid Waiver Waitlist
- ***U.S. v. North Carolina* -** North Carolina Agrees to Provide Community Based Supports and Transition Residents with Mental Illness from Large Adult Care Homes
- ***Van Meter v. Mayhew*** - Maine Federal District Court Approves Olmstead Settlement on Behalf of Individuals with Developmental Disabilities in Nursing Facilities

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Recent Litigation on the ADA and Criminal Justice

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Recent Criminal Justice ADA Decisions – Solitary Confinement

***Disability Law Center v. Massachusetts Dep't of Corrections*,**
2012 WL 1237760 (D. Mass. 2012)

- **Background:** A lawsuit was brought against the State of Massachusetts alleging that housing mentally ill prisoners in solitary confinement violated the ADA, Section 504, and the 8th and 14th Amendments of the Constitution.
- **The court approved a settlement that provides:**
  - Expanded mental health services
  - Reduction or removal of segregation
  - Use of secure treatment units as alternatives to segregation

For more on the agreement, go to:
http://www.dlc-ma.org/prisonsettlement/index.htm

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Recent Criminal Justice ADA Decisions – Failure to Accommodate

Jaros v. Illinois Dep't of Corrections,
684 F.3d 667 (7th Cir 2012)

- **Background:** Prisoner, who used a cane due to his advanced osteoarthritis and vascular necrosis in his hip, filed suit when he was unable to access showers and meals the same as non-disabled prisoners, and because he was denied access to the prison's work release program because of his use of a cane.
- **Court:** Plaintiff is able to proceed with his claim under the Rehabilitation Act that the IDOC failed to accommodate his disabilities, and his claim for denial of participation in the prison's work release program. (The court rejected the plaintiff's claim that the state's actions violated the 8th Amendment's prohibition against cruel and unusual punishment.)

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Recent Litigation on the ADA and Transportation

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Recent Transportation ADA Decisions – Modifications/Technically Infeasible

HIP Heightened Independence and Progress, Inc., v. Port Auth. of New York and New Jersey,
2012 WL 393775 (3d Cir. Sept. 11, 2012)

- Transit agency modified a train station, but did not make it accessible.
- **District Court:** Modification triggered accessibility requirements and transit authority ordered to make station accessible.
- **3rd Circuit:** Mandated modifications may not be required if transit agency can show the modifications would be technically infeasible and case was remanded to the trial court to make that determination.

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Recent Transportation ADA Decisions – Accessible Taxis

Noel v. New York City Taxi and Limousine Commission,
2012 WL 2437954 (2d Cir. June 28, 2012)

- **Background:** Lawsuit alleged New York taxis did not provide meaningful access to people with disabilities, violating the ADA.
- **District Court:** Issued injunction requiring that all new taxis be wheelchair accessible until the defendant adopted a comprehensive plan to provide meaningful access.
- **2nd Circuit:** Reversed district court. Title II does not require public entities to police ADA compliance of the private entities that it licenses. The ADA regulations do not compel the defendant to have a minimum number of accessible taxis.

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Recent DOJ Settlements: Accessible Charter Buses

In September and October 2012, DOJ reached settlements with four over the road bus companies in Florida

- Charter bus companies provided "luxury" buses & other services
- Settlement Requirements include:
  - Compliance with Title III Regulations requiring accessible transportation or equivalent services so as not to exclude people with disabilities and ensuring a full and equal opportunity to benefit from the service.
  - ADA training shall be provided to all employees.
  - Periodic reports shall be filed.
  - See the press release at: http://www.justice.gov/opa/pr/2012/October/12-crt-1225.html
  - See settlements at: http://www.ada.gov/settlemt.htm

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Recent Litigation on Voting

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Recent Voting ADA Decision – Meaningful Access

United Spinal Association v. Bd. of Elections in the City of N.Y.,
2012 WL 3222663 (S.D. N.Y. August 8, 2012)

- **Background:** Disability organization filed suit under the ADA and Section 504 alleging that the Board of Elections did not provide meaningful access to people with disabilities for voting as many polling places were inaccessible.
- **Court:** Found in favor of the plaintiff
  - No dispute of fact as to pervasive and recurring barriers to accessibility of polling places on election days at sites designated by defendant.
  - Plaintiff did not have to show actual deprivation of voting to prevail on a voting discrimination claim.
  - Standard under Title II is "meaningful access" and defendant did not meet that standard.
  - Defendant's efforts to accommodate people with disabilities fell short.

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Recent Litigation on Public Accommodation Access

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Recent Decision Interpreting Definition of Public Accommodation

National Association of the Deaf v. Netflix,
2012 WL 2343666 (D. Mass. June 19, 2012)

- Suit against Netflix for failing to provide equal access to its "Watch Instantly" website as only a small portion of the content was captioned.
- **Court:** Rejected Netflix's argument that its website was not a "place of public accommodation" under Title III.
  - Congress did not intend to limit the ADA to the specific examples listed in the categories of public accommodation.
  - ADA is not inconsistent with duties under the Twenty–First Century Communications and Video Accessibility Act (CVAA),
- **Settlement:** Following the court ruling, the parties reached a settlement agreement in which Netflix will provide captioning on 100% of its streaming videos within 2 years. See: http://dredf.org/mail-enews/2012/october/Historic-Settlement-in-Close-Caption-Case.html

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Recent Decisions Involving Segway Access to Amusement Parks

Baughman v. Walt Disney World Company,
685 F.3d 1131 (9th Cir. 2012)

Ninth Circuit holds that request to use segways at Disneyland was a necessary and reasonable modification under the ADA.

Ault v. Walt Disney World,
2012 WL 3740682 (11th Cir. 2012)

Eleventh Circuit holds District Court did not abuse its discretion in approving class action settlement upholding ban on segways at Disney properties.

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Recent Decisions Involving Access to Movie Theaters

- In October 2011, Arizona Attorney General and Arizona P&A successfully settled movie theater captioning suit against state's largest movie chain following positive ruling by 9th Cir. in ***Arizona v. Harkins***, 603 F.3d 666 (2010).
- Cinemark in Texas agrees to provide audio description: http://lflegal.com/category/audio-description-issues/
- IL Attorney General successfully negotiates agreement with State's largest movie chain to provide captioning and audio description: http://www.equipforequality.org/news/pressreleases/april_04_2012amctheatres.php

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Recent Decisions Involving Access to Businesses

Colorado Cross Disability Coalition v. Abercrombie & Fitch Co.,
2011 WL 4002250 (D. Col. Aug. 31, 2011)

- Colorado District Court finds entrance designs to two Hollister stores violate ADA. Compliance with numerous precise design standards does not protect company from broad statutory accessibility requirements.

Moeller v. Taco Bell,
2011 WL 4634250 (N.D. Cal. Oct , 2011)

- California District Court finds Taco Bell in violation of ADA and State standards, including accessible parking, door forces, queue lines, access to self-service items, and accessibility of the restrooms.

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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 Had Standing

Walker v. Asmar Center LLC, 2011 WL 5822394 (E.D. Mich. 2011)

- **Background:** A wheelchair user sued a shopping center for lack of accessibility. The shopping center alleged that he could not bring suit because he lacked legal standing, and because he did not exhaust his administrative remedies before filing suit.
- **Court:** Rejected the shopping center's argument that they did not need to provide wheelchair accessibility because the plaintiff might not return to their shopping center and that there is a closer, similar business to his home.
- Court also held that the plaintiff did not need to exhaust administrative remedies under Title III (i.e. filing with a state or federal administrative agency) because Title III does not have an exhaustion requirement.

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Standing to Sue – Cases Where Plaintiff Had Standing

Means v. St. Joseph County Bd. of Commissioners,
2011 WL 4452244 (N.D. Ill. Sept. 26, 2011)

Court allowed two wheelchair users who had pending litigation in the County Building to continue with their ADA claims seeking prospective relief in the form of improved accessibility because they provided evidence that they would be returning to the court house in the future. Therefore, the court found that they had legal standing to sue under Title II of the ADA.

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Other Hot Topics Under ADA Titles I, II and/or III

- Reassignment in employment. See ***EEOC v. United Airlines***
- Pre-employment personality testing
- Recent EEOC Guidance on arrest and conviction records: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- Required medical disclosures on professional licensing applications
- Recent DOJ Title III Regulations
- Post-secondary institutions expelling students who seek or require mental health treatment
- Audio description and closed captioning in live theater (See recent settlements in movie theaters discussed above)

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General ADA Resources

- **ADA National Network** www.adata.org
  - ADA Case Law Database
    - wwwadacaselaw.org
  - ADA Legal Webinar Series
    - http://www.ada-audio.org/Webinar/ADALegal/
- **National Disability Rights Network (NDRN)** www.ndrn.org

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General ADA Resources (con't)

- **Department of Justice** www.ada.gov
- **Job Accommodation Network** www.jan.wvu.edu
- **Equal Employment Opportunity Commission** www.eeoc.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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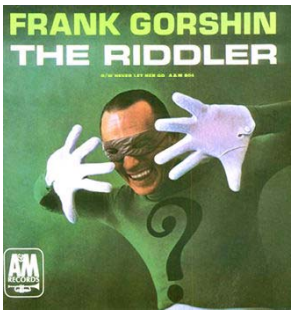
ADA Case Law Update

QUESTIONS?



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