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

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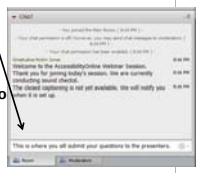

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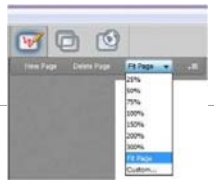

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Top ADA Cases of 2013

Presented by:
Barry Taylor, VP for Civil Rights and Systemic Litigation, Equip for Equality

Rachel Weisberg, Staff Attorney, Equip for Equality

January 15, 2014

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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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Cases for Today's Webinar

Title I Cases

- *Gogos v. AMS Mechanical Systems*
- *McMillan v. City of New York*
- *EEOC v. AT&T Corporation*
- *Feist v. Louisiana Department of Justice*
- *Basden v. Professional Transportation*
- *Huiner v. Arlington School District*
- *EEOC v. Beverage Distributors Company, LLC*

Cases for Today's Webinar

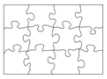
Title II Cases

- *U.S. v. Rhode Island and City of Providence*
- *Brooklyn Center for Independence v. Bloomberg*
- *California Council of the Blind v. County of Alameda*

Title III Cases

- *Argenyi v. Creighton University*
- *Scherr v. Marriott International, Inc.*
- *Houston v. Marod Supermarkets*

Cases for Today's Webinar



Updates from ADA Cases Highlighted in 2012 Webinar

- *EEOC v. United Airlines*
- *EEOC v. Henry's Turkey Service*
- *Taxis for All Campaign v. Taxi and Limousine Commission (formerly Noel v. TLC)*

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Top ADA Cases for 2013

Title I Cases

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ADAAA and the Definition of Disability

Gogos v. AMS Mechanical Systems
--- F.3d ---, 2013 WL 6571712 (7th Cir. Dec. 16, 2013)

- Plaintiff worked as a pipe welder for 45 years
- Had high blood pressure for over 8 years, controlled by meds
- For a short period of time, his blood pressure spiked to "very high" and he experienced intermittent vision loss
- 1/30/13: Supervisor granted request to leave work to seek immediate medical treatment because his eye was red
- Plaintiff told the general foreman that he was going to the hospital because his "health [ha]s not been very good lately"
- Foreman fired Plaintiff on the spot

Gogos: Definition of Disability

- District court = Dismissed case
  - Found disabilities to be "transitory" and "suspect"
  - Not covered under ADA
- Appellate court = Found for Plaintiff
  - One of the first appellate court decisions substantively applying the ADAAA
- Analysis (Applied numerous provisions of the ADAAA):
  - **Episodic conditions:** Even if Plaintiff's blood pressure spike and vision loss are episodic, can be disabilities
  - Noted that EEOC lists hypertension as an example of an impairment that may be episodic

Gogos: Definition of Disability

- **Short Term Impairments:** Even if Plaintiff's blood pressure spike and vision loss are short-term, can be disabilities
  - Appendix to EEOC regs: "The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity."
- **Major Bodily Function:** Blood pressure spike and intermittent blindness substantially limit two major life activities, eyesight and circulatory function
  - Court easily accepts concept of major bodily function

Gogos: Definition of Disability

- **Mitigating Measure:** Plaintiff's chronic blood-pressure condition could also qualify as a disability
  - Must disregard ameliorative effects of mitigating measures, such as medication
  - Cited Appendix to EEOC regs, which includes language directly "on point" regarding an individual who takes medication for hypertension and who would have substantial limitations to cardiovascular and circulatory system without medication
- Plaintiff alleged other elements of prima facie case:
  - Qualified: Plaintiff has 45 years of experience
  - Adverse action: He was fired immediately after disclosure

ADAAA: Other Recent Trends

Courts generally applied the ADA Amendments Act in accordance with Congressional intent, and broadly interpreted the definition of disability

Additional Resources:

- Legal Brief and PowerPoint Presentation for The Legal Landscape Five Years After the Passage of the ADA Amendments Act
  - www.ada-audio.org/Archives/ADALegal/index.php?type=fiscalYear&id=15&app=2
- National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act
  - www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb
- An Empirical Analysis of Case Outcomes Under the ADA Amendments Act, Stephen F. Befort, University of Minnesota Law School
  - http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2314628_code702020.pdf?abstractid=2314628&mirid=1

Qualified: Two Recent Cases about Essential Job Functions

McMillan v. City of New York
711 F.3d 120 (2d Cir. 2013)

- Plaintiff works as a case manager for a city program
- Job duties include conducting home visits, processing social assessments, recertifying clients' Medicaid eligibility
- City has flex-time policy; employees are late if arrive after 10:15
- Plaintiff has schizophrenia, and takes medication that makes him extremely "drowsy" and "sluggish" in the morning
- Arrives late, often after 11:00 am, which City allowed for 10 yrs
- In 2008, City stopped approving late arrivals and suspended Plaintiff (City recommended termination, but union grieved)
- Plaintiff formally requested reasonable accommodations

McMillan: Timeliness as an Essential Job Function

- **District court:** Arriving at work within one-hour time frame is an essential function of the job – found for City
  - Deferred to employer judgment
  - Noted that timeliness is a requirement of virtually all jobs
- **2nd Circuit:** Question of fact – found for employee
  - Timely arrival at work may generally be an essential function, but courts must still conduct a fact-specific inquiry
  - Here, Plaintiff worked for many years with late arrivals, which the City approved either explicitly or implicitly
  - City had a flex-time policy permitting all employees to arrive and leave within one-hour window, suggesting that punctuality was not an essential function

McMillan: Timeliness as an Essential Job Function

- Distinguished cases where timeliness was essential, such as:
  - Job duties required presence during specific hours
  - Employee was a supervisor
  - Company had to meet certain deadlines
- Plaintiff's accommodation requests could be reasonable:
  - Plaintiff's request to work unsupervised after 6:00 p.m. is not unlike a request to work from home (or home visits)
  - City already has a policy of allowing employees to "bank" any hours and apply to late arrivals
- **Query:** What is the future of timeliness as an essential job function in the world of telework and flextime?

AT&T: Attendance as an Essential Job Function

EEOC v. AT&T Corporation
2013 WL 6154563 (S.D. Ind. Nov. 20, 2013)

- Plaintiff worked as a customer service specialist, and needed treatment for Hepatitis C
- Plaintiff received a written warning that said: "Attendance is an essential function of your job. Satisfactory attendance is a condition of your employment!"
- After over four months of leave (STD and FMLA), Plaintiff sought to return to work in October 2010
- She was terminated for excessive absences
- During Plaintiff's leave, AT&T did not hire anyone to fill-in for Plaintiff or require other employees to work overtime

AT&T: Attendance as an Essential Job Function

- **Issue:** Was Plaintiff a qualified employee? Is attendance an essential function of Plaintiff's employment?
- **Parties' arguments:**
  - EEOC - AT&T has 22 formal leaves of absence plans & Plaintiff's job description was silent about whether attendance was an essential job function
  - AT&T - Written warning and manager's testimony demonstrated that attendance is an essential job function
- **Court:** A jury could find that attendance is an essential job function OR that attendance is not an essential job function
  - Issue of fact whether leave was requested and whether it created an undue hardship

Reasonable Accommodation – Unrelated to Essential Job Functions

Feist v. Louisiana, Department of Justice
730 F.3d 450 (5th Cir. 2013)

- Attorney with osteoarthritis of the knee requested a free on-site parking space to accommodate her disability
- **District court:** Found for employer
  - Plaintiff did not demonstrate a need for an accommodation to perform the essential functions of her job
- **Question on appeal:** Whether ADA requires a link between an accommodation and an essential job function
- **5th Cir:** ADA statute and interpretive authority indicate that Plaintiff is correct – no need to link to essential job function

Feist: Reasonable Accommodations

- **ADA:** Reasonable accommodations may include "making existing facilities … readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12111(9)
- **EEOC Regs:** 3 categories of reasonable accommodations:
  - 1-job applications; 2-essential job functions; 3-enjoy equal benefits and privileges 29 C.F.R. § 1630.2(o)(1)
- **Appendix to EEOC Regulations:** "[P]roviding reserved parking spaces" may constitute reasonable accommodation under some circumstances. 29 C.F.R. pt. 1630 App., § 1630.2(o)
- Court remanded to determine whether accommodation was reasonable

QUERY: What are the potential implications of this case?

The Interactive Process: Two Recent Cases

Basden v. Professional Transportation Inc.
714 F.3d 1034 (7th Cir. 2013)

- Plaintiff worked as a dispatcher for a company that provided around-the-clock ground transportation service for railroads
- All employees were subject to attendance policy
- Plaintiff missed work on a number of occasions for medical appointments to determine if she had MS, and received written warnings and suspensions
- She requested an unpaid 30-day leave of absence
- Employer denied her request, failed to engage in the interactive process, and fired plaintiff for missing work
- ADA claim: Wrongful termination & failure to accommodate

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Basden: Interactive Process

- Court granted summary judgment for the Defendant
  - 7th Circuit affirmed decision
- Termination claim
  - Plaintiff was not qualified – employers are generally permitted to treat attendance as an essential function
  - Plaintiff failed to provide evidence that she would have been able to return to work on a regular basis
    - Testimony that she had hoped that a diagnosis and medication would allow her to return to work
    - Affidavit from psychiatrist that "there was a good chance" she could return to work with treatment

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Basden: Interactive Process

- Reasonable accommodation claim
  - ADA requires parties to engage in the interactive process
  - Undisputed that employer failed to engage in process
  - However, failure to engage in the interactive process is not an independent basis for liability
- "Even if an employer fails to engage in the required process, that failure need not be considered if the employee fails to present evidence… that she was able to perform the essential functions of her job with an accommodation."
- Here, no evidence that Plaintiff was qualified, so failure to engage in the interactive process not a violation
- **Note**: Not a best practice. Risky move for employers

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Huiner: Interactive Process

Huiner v. Arlington School District
2013 WL 5424962 (S.D. Sept. 26, 2013)

- Art teacher requested a number of accommodations for her anxiety, including a reduced course load to remove one new class (credit recovery) until her symptoms stabilized
- School district granted some requests; denied others
- In response to requests, school district sent Plaintiff three letters but never met to discuss requests in person
- After receiving third letter, teacher learned that the principal recommended nonrenewal of her contract
- Teacher filed ADA claim; School sought summary judgment
- Both parties alleged failure to engage in interactive process

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Huiner: Interactive Process

- **Court:** Found for Plaintiff – claim can move forward
- Plaintiff did not break down interactive process
  - After receiving the third letter, Plaintiff learned that the principal recommended nonrenewal of her contract
  - A reasonable jury could find that the School District was not acting in good faith and Plaintiff's further participation in the interactive process would have been useless
  - School district failed to meet with teacher face-to-face to discuss her disability accommodations
- Litigation tip: Identify reasonable accommodation
  - Here, jury could find that requested workload reduction re: credit recovery class was a reasonable accommodation
- Tip: Both sides should engage in interactive process

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Medical Exams and Inquiries

EEOC v. Beverage Distributors Company, LLC
11-cv-02557 (D.Colo.)

- Employee who is legally blind worked as a driver's helper for over four years
- After the Company eliminated his position, employee applied for a position as a night warehouse loader
  - Involves loading cases of liquor/kegs of beer into trucks
- Company issued a conditional job offer, subject to a pre-employment medical examination
- After medical examination, the Company withdrew the job offer, believing that the employee could not safely perform the functions of the position due to his eyesight

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Beverage Distributors Co. Using Medical Information

- Reminder: After extending a conditional job offer, employers can ask disability-related questions or require a medical exam IF it is done uniformly for all incoming employees 42 U.S.C. § 12112(d)(3)
  - But employers cannot use the results unlawfully
- EEOC lawsuit: Employer used results of med exam unlawfully
- 2012: Court denied employer's motion for summary judgment on whether employee posed a direct threat. *E.E.O.C. v. Beverage Distributors Co., LLC*, 2012 WL 6094152 (D. Colo. Dec. 7, 2012)
- 2013: Four-day jury trial – Jury found:
  - Employer intentionally violated the ADA and awarded employee $132,347 in back pay; however, found employee failed to "mitigate" damages – reduced award

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Beverage Distributors Co. Using Medical Information

Dec. 2013: Court order

- Vacated jury's finding reducing employee's back pay, holding that the Company failed to identify comparable jobs that the employee could have performed
- Awarded interest on back pay
- Ordered Defendant to hire employee as a night warehouse loader with the same seniority and salary he would have received but for the discrimination
- Ordered employer to engage an outside consultant to provide employee training and revise employee policies, job postings, notice postings, and do a compliance review

www.eeoc.gov/eeoc/newsroom/release/12-12-13a.cfm

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Top ADA Cases for 2013

Title II Cases

U.S. v. Rhode Island and City of Providence

Brooklyn Center for Independence v. Bloomberg

California Council of the Blind v. County of Alameda

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Olmstead Litigation: Background

- Olmstead: 2 women unable to leave state-run institutions
- **Supreme Court:** Unjustified isolation of people with disabilities is discrimination
- Over the years, case has been applied beyond original facts. ADA integration mandate also applied to:
  - People at risk of institution
  - People living in state-funded, but privately owned institutions
- In 2012, court found that the integration mandate also applied to people in segregated workshops
  - ***Lane v. Kitzhaber***, 841 F. Supp. 2d 1199 (D. Ore. 2012)

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DOJ Settlement re Sheltered Workshop

U.S. v. Rhode Island and City of Providence
1:13-cv-00442 (D.R.I. 2013)

- DOJ investigation: State and City unnecessarily segregated individuals in a sheltered workshop/segregated day program
- Segregated program (Training Thru Placement-TTP)
  - Located in a secluded area in a dilapidated former school
  - 90 individuals spent their days packaging and labeling medical supplies, wrapping tv remote controls in plastic or sorting jewelry, and playing cards, coloring and socializing
  - On average, pwds stayed 15-30 years; earned $1.57/hour
  - Benefit from supported employment/integrated day services

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U.S. v. Rhode Island and City of Providence

- DOJ investigation: State/City placed public school students at risk of unnecessary segregation in same program
- High school program (Birch Vocational Program)
  - 85 students in special education program in public high school spent part of the day in a school-based and school-operated sheltered workshop as part of the curriculum
  - Required to perform various mundane tasks (e.g., hand-sorting jewelry) in exchange for subminimum or no wages
  - High school program is a direct pipeline to TTP
  - Students qualify for integrated transition services (mentorships, internships, trial work experiences)

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U.S. v. Rhode Island and City of Providence

- ADA's integration mandate applies to all programs and services of a public entity, including its day programs
- States/cities cannot administer policies that steer individuals into facility-based sheltered workshops and away from available, appropriate integrated alternatives if the individuals qualify for and do not oppose the latter
- State/City entered into a court-enforceable interim settlement agreement – DOJ will continue its state-wide investigation
- Goal: Achieve integration for individuals who can and want to work but who have remained unnecessarily in workshops

Complaint. Agreement, Press Release, Fact Sheets: www.ada.gov/olmstead/olmstead_cases_list2.htm#ri

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U.S. v. Rhode Island and City of Providence

Agreement Terms: Over the next year, State/City will…

- Stop funding or supporting workshop/day program at TTP and Birch (Birch workshop is closed)
- Provide career development plans/benefits counseling
- Provide supported employment services and placements
  - Jobs must pay at least min. wage & be individual placements
  - Target population must work on average 20 hours/week
  - Individuals may make an informed choice to participate in sheltered work, group work or other segregated settings through a variance process
- Provide integrated day services for a total of 40 hours/week of work and non-work activities

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U.S. v. Rhode Island and City of Providence

Employment First Initiative

Agreement Terms (continued):

- Provide annual career development planning
- Adopt appropriate Employment First Policies
  - Note: State adopted policy before finalizing settlement
- Develop transition planning process for students focusing on integrated employment outcomes and with trial work experience
- Ensure students have opportunities to graduate with diploma
- Develop education program to inform individuals of choices
- Monitoring requirements

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U.S. v. Rhode Island and City of Providence

- Cities and states looking to transition to supported employment:
  - Look to terms of settlement as guidance
  - Other resources: Department of Labor's Office of Disability Employment Policy
    - www.dol.gov/odep/ietoolkit/policymakers.htm
- **Note:** Department of Labor revoked TTP's certification under FLSA Section 14(c), allowing subminimum wages
- For more information about DOJ's Olmstead work, including stories about people who have benefitted from DOJ's agreements, go to: www.ada.gov/olmstead/

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Other Olmstead Decisions

- ***Amanda D. v. Hassan/U.S. v. New Hampshire***
  State of New Hampshire Agrees to Expand Community Mental Health Services and Prevent Unnecessary Institutionalization
  www.justice.gov/pa/pr/2013/December/13-crt-1347.html
- ***U.S. v. New York/O'Toole v. Cuomo***
  State of New York Agrees to Provide Community Services to Adult Home Residents with Mental Illness
  http://www.bazelon.org/News-Publications/Press-Releases/7.22.2013Landmark-New-York-City-DAI-Settlement.aspx
- ***T.R. v. Quigley***
  State of Washington Agrees to Expand Community Mental Health Services for Kids
  http://www.disabilityrightswa.org/settlement-statewide-class-action-approved-court

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Emergency Preparedness: Two Recent Cases

Brooklyn Center for Independence v. Bloomberg
--- F.Supp.2d ---, 2013 WL 5943995 (S.D.N.Y. Nov. 7, 2013)

- Filed after Hurricane Irene
- Alleged that NYC failed to plan for the needs of people with disabilities in large scale disasters
- Plaintiffs moved for class certification (nearly 900,000) right around time of Hurricane Sandy
- March 2013: Bench trial
  - Example of testimony: Class member unable to use oxygen machine despite informing utility provider of her reliance on electricity. Her health deteriorated, leading her to require emergency medical attn for oxygen deprivation.

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Brooklyn Center for Independence: Emergency Preparedness

- May 2013: DOJ filed statement of interest
  - www.ada.gov/brooklyn-cil-brief.doc
- November 2013: Court opinion finding that NYC violated ADA with inadequate emergency preparedness plan
  - First opinion, post-trial, finding that a gov't's emergency preparedness violated the ADA and Rehab Act
- NYC's emergency plans for residents: "Impressive"
- NYC's system for people with disabilities: "Benign neglect"
  - No system for mass evacuation of pwds from high-rise buildings
  - Lacks reliable and effective communication systems

Brooklyn Center for Independence: Emergency Preparedness

- Add'l violations of the ADA/Rehab Act:
  - Unaware which emergency shelters are accessible, and tells pwds that needs will not be met at shelters
  - No protocol to address needs of pwds in power outages
  - Relies on largely inaccessible public transit for evacuations
- Instead of ordering specific remedy, the Court:
  - Directed parties to confer with one another and with DOJ
  - If parties cannot reach an agreement, Court will impose remedies, and possibly have a second trial on this issue
  - Stay tuned for information on remedies

CALIF settlement: Emergency Preparedness

CALIF v. City of Los Angeles
09-cv-00287 (C.D. Cal.)

- Complaint: L.A. failed to meet the needs of its residents with disabilities in planning for disasters
- 6/10/13: Court approved class action settlement
  - Retains jurisdiction for six years to enforce terms
- County completed a Persons with Disabilities and Access and Functional Needs Annex to its Operational Area Emergency Plan that contained specific deliverables and time frames
- County hired an Access and Functional Needs Coordinator responsible for ensuring the County meets needs of pwd

More information: www.dralegal.org/impact/cases/communities-actively-living-independent-and-free-calif-et-al-v-city-of-los-angeles

Right to Vote Privately and Independently

California Council of the Blind v. Cty. of Alameda
2013 WL 5770560 (N.D. Cal. Oct. 24, 2013)

- Help America Vote Act (HAVA): Requires all polling places to have at least one accessible voting machine
  - Machines have an audio ballot feature that reads aloud instructions and voting options
  - With working tactile keyboard/headphones, voters who are blind can submit a ballot privately and independently
- ADA/Rehab Act complaint: During the last two elections, County failed to ensure that accessible voting machines could be activated and operated by poll workers, and voters who are blind were forced to rely on third parties to vote

Right to Vote Privately and Independently

- Plaintiffs argue - County must take affirmative steps to ensure that accessible voting machines are fully operational by:
  - Providing adequate training of poll workers
  - Conducting adequate testing of each machine and features
  - Providing timely and skilled technical support services
  - Deploying replacement machines in a timely manner
  - Investigating non-functioning machines to determine cause
  - Identifying and implementing solutions to such problems
- County failed to do this, and as a result, many people were forced to rely on third-parties (poll-workers, family) to vote
- Def. argued: No ADA right to vote privately/independently

Right to Vote Privately and Independently

- **Court:** Plaintiffs' claim can move forward – under the ADA/Rehab Act, a covered entity must provide meaningful access to private and independent voting
  - Voting is a service of a municipality, and one of the "central features" and "benefits" of voting is "voting privately and independently"
  - Voters should be given equal opportunity
  - Being forced to rely on third parties creates an inferior voting experience
  - To be effective, auxiliary aids and services must be provided in a way to protect the "privacy and independence" of the individual with a disability

Right to Vote Privately and Independently

Help America Vote Act
HAVA

- Acknowledged that no other court had a similar finding
- Few reasons why:
  - Changing times: "accommodations provided to individuals with disabilities must change as technology progresses"
  - Court disagreed with other courts' conclusion that the ADA/Rehab Act only require individuals to be able to vote--not to vote privately and independently
- Focused on "meaningful access" language
- Rejected Defendant's argument that HAVA's requirements for accessible voting precludes ADA/Rehab Act claims
- Court also cited Title II's maintenance requirement

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Top ADA Cases for 2013

Title III Cases

Argenyi v. Creighton University
Scherr v. Marriott International, Inc.
Houston v. Marod Supermarkets

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Effective Communication

Argenyi v. Creighton University
703 F.3d 441 (8th Cir. 2013)

- Michael is deaf and learned to communicate through cued speech interpreters at a young age, and used Communication Access Realtime Translation (CART)
- Relied on CART and cued speech interpreters in Seattle University and graduated with a 3.87 GPA
- Applied to medical school; Disclosed his disability
- Once admitted, he requested: CART for lectures; cued speech interpreter for labs; FM system for small groups
- Michael provided medical support for his requests

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Argenyi: Effective Communication

- Creighton University denied request – offered only FM system
- Michael tried to use FM system but ultimately renewed his initial requests, explaining that FM system caused him stress and fatigue, and to miss information; explained FM system did not provide for meaningful participation or independence
- Creighton University offered enhanced note-taking services
- In 2009, Michael brought this lawsuit and continued school
- In Feb. 2010, Michael consulted with expert who testified that FM system gave Michael only 38% speech perception, and actually worsened Michael's speech recognition

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Argenyi: Effective Communication

- 2nd year: Renewed request for accommodations
- Creighton provided an interpreter - not CART - for lectures
- Michael found interpreter was insufficient to convey complex new vocabulary so funded CART himself
- Michael ultimately borrowed over $100,000 to fund his own accommodations
- Creighton refused to allow Michael to use an interpreter in his clinical courses, even if he paid for the interpreter himself
- After passing his 1st and 2nd year, Michael believed that he would not be successful in his clinical courses without an interpreter and took a leave of absence

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Argenyi: Effective Communication

- **District court:** Found for Creighton University
  - Disregarded facts in Michael's affidavit as "self-serving"
  - Found testimony to be "unsupported" despite evidence from medical professionals
  - Concluded that Michael's requested accommodations were not "necessary" because he was capable of attending school and passing classes without them
- **Appellate court:** Reversed – found for Michael
  - Concluded that the district court erred both with respect to the facts and the law
- Amici filed by DOJ (www.justice.gov/crt/about/app/briefs/argenyibrief.pdf), Alexander Graham Bell Ass.; NDRN; Ass. of Med. Profess. with Hearing Losses

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Argenyi: Eighth Circuit's Assessment of Facts

- District court erred when striking Michael's affidavit and finding no other evidence to support his claim
- Affidavit: "In a case such as this it is especially important to consider the complainant's testimony carefully because 'the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective.'" citing DOJ's Tech. Asst. Man.
- Affidavit: Michael stated that without CART and interpreters:
  - Unable to follow class lectures and dialogue
  - Unable to communicate with patients in clinical setting
  - Experienced debilitating headaches and extreme fatigue
- Other evidence: Letters from doctors confirming need

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Argenyi: Eighth Circuit's Assessment of Law

Disability Rights Nebraska

- ADA/Rehab Act requires Creighton to provide necessary auxiliary aids and services
- District court misinterpreted Supreme Court decision to mean that "necessary" requires a showing that individual was "effectively excluded" to warrant protection
- Instead, adopted "meaningful access" standard
- Not required to produce identical result/achievement, but must afford equal opportunity to gain the same benefit
- Genuine issue of material fact as to whether Creighton denied Michael an equal opportunity to gain the same benefit from medical school as his peers by refusing accommodations

www.disabilityrightsnebraska.org/what_we_do/michael_argenyi_case.html

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Argenyi: Jury Trial

- Jury trial in August 2013 - Jury found for Michael
  - Creighton University discriminated against Michael in violation of the ADA and the Rehab Act
  - Auxiliary aids would not have caused an undue burden
  - No intentional discrimination (no $$ for Michael)
- Judge charged with deciding whether Creighton must accommodate Michael in his final two years of medical school and reimburse him for the cost of past accommodations

www.nytimes.com/2013/08/20/us/deaf-student-denied-interpreter-by-medical-school-draws-focus-of-advocates.html?_r=0

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Argenyi: Injunctive Relief

- 12/19/13: Court opinion re: injunctive/equitable relief
  - Court ordered Creighton University to provide Michael with auxiliary aids and services for his effective communication needs, including CART in "didactic settings" and sign-supported oral interpreters in small group and clinical settings
  - Court denied Michael's request for equitable relief in the form of reimbursement

See also *K.M. v. Tustin Unif. Sch. Dist. et al.*, 2013 WL 3988677 (9th Cir. Aug. 6, 2013) (reversing summary judgment on whether school violated ADA by failing to provide CART, noting that compliance with IDEA does not necessarily mean compliance with Title II's requirement for "meaningful access")

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Accessible Course Material: Three Recent Settlements

- **Louisiana Tech University:** DOJ Settlement
  - www.ada.gov/louisiana-tech.htm
- **South Carolina Technical College System:** Voluntary Resolution Agreement with the Office of Civil Rights – Department of Education
  - www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.doc
- **UC Berkley:** Private Settlement - Structured Negotiations with Disability Rights Advocates and Three Students
  - www.dralegal.org/impact/cases/uc-berkeley-accommodations-initiative-structured-negotiations

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Continuing Violation Doctrine and Title III Standing

Scherr v. Marriott International, Inc.
703 F. 3d 1069 (7th Cir. 2013)

- Plaintiff uses a walker as she is an elderly woman (76 years old) with a neuro-degenerative disorder
- Lives in Illinois; travelled to Overland Park, Kansas in 2006
- Booked accessible room at Courtyard Marriott hotel
- Plaintiff regularly visits 29 relatives in the Overland Park area
- In 2004, Marriott renovated 56 of its hotels, including Overland Park location
- Installed spring-hinged door closer mechanism on the bathroom doors of its accessible rooms

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Scherr v. Marriott International

- Spring-hinged doors close faster than a hydraulic-arm closer
- During stay, Plaintiff broke her wrist and injured her hip when the door closed quickly and caused her to fall to the floor
- Plaintiff filed a negligence action, which settled
- In November 2010, filed ADA suit for declaratory judgment; injunctive relief; costs/attorneys' fees
- Defendant argued:
  - 1- Plaintiff's claim is barred by the statute of limitations
  - 2- Plaintiff lacks standing to sue
  - 3- Marriott is in compliance with ADA technical standards

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Legal Issue #1: Statute of Limitations

Question: When does a plaintiff need to file an ADA lawsuit re: an ongoing architectural ADA violation?

Background: Courts have employed different analyses

- (1) Claim accrues when plaintiff knew or should have known about an ADA violation *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011)
- (2) Claim accrues each time a plaintiff experiences an ADA violation, even if the plaintiff has experienced the same barrier on a previous occasion *Hoewischer v. Sailormen, Inc.*, 2012 WL 2865788 (M.D. Fla. July 10, 2012)
- (3) In Fair Housing Act design and construction case, claim accrues at the end of design and construction *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc)

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Scherr: Continuing Violation Doctrine

- **District Court:** Rejected Marriott's argument that Plaintiff's claim was barred by the statute of limitations (2 yrs in Illinois)
- **Seventh Circuit:** Affirmed
  - ADA makes injunctive relief available to an individual "is being subjected to" discrimination or "is about to be subjected to" discrimination
  - ADA considers a continuing or threatened violation of the ADA to be an injury
  - Existence of unlawful barriers to access is a continuing violation of the statute that continues to impose injury
  - Statute of limitations does not bar claim

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Legal Issue #2: Title III Standing - Background

- Article III of the Constitution requires plaintiffs to have "standing" to bring a lawsuit
- What is standing? *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)
- Plaintiffs must establish:
  - (1) An injury-in-fact that is concrete and particularized, and actual and imminent
  - (2) A causal connection between the injury and the defendant's conduct
  - (3) A favorable court decision will redress plaintiff's injury
- To establish an injury-in-fact when seeking prospective injunctive relief, Plaintiffs must show a "real and immediate" threat of future violations of their rights

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Scherr: Standing

- **District court:** Plaintiff had standing to sue Courtyard Marriott in Overland Park but not other hotels
- **Seventh Circuit:** Affirmed
- Overland Park Marriott = Plaintiff has standing to sue
  - Stated that she would use the hotel but for its accessibility
  - Plaintiff travelled regularly to Overland Park
  - Hotel was close to 29 of her relatives
  - Plaintiff expressed a desire to stay at the hotel in the future for a family wedding.
  - Thus – Plaintiff established a real and immediate threat

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Scherr: Standing

- Other 56 hotels = Plaintiff does not establish real or immediate harm so has no standing to sue
  - Although Plaintiff need not engage in a "futile gesture" of visiting all to assess accessibility, she must assert an intent to return to the place where the violation is occurring
  - Plaintiff listed a number of trips taken over the past few years, but does not claim that she would visit a particular Courtyard Marriott but for an alleged ADA violation
  - Plaintiff does not show an intent to return to geographic area where other Courtyard Marriotts are located
- Practice tip: Be specific about intent to return
- Note: Plaintiff lost on merits – specific door not a violation

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Do "Testers" Have Standing?

Houston v. Marod Supermarkets
733 F. 3d 1323 (11th Cir. 2013)

- Plaintiff filed lawsuit re: parking; path of travel; restrooms
- Undisputed facts about Plaintiff:
  - Visited supermarket twice in the past
  - Lives approximately 30.5 miles from supermarket
  - Wants to return to shop and to assess ADA compliance
  - Motive for visiting store = tester
  - Vice President of advocacy group (Access 4 All)
  - He and/or advocacy group are party to 271 ADA lawsuits
  - Supermarket is close to Plaintiff's lawyer's office (1.8 mi)

Houston: Do Testers Have Standing?

- **District court:** Plaintiff does not have standing
  - Plaintiff was a "tester of ADA compliance" and not a "bona fide patron" of the Supermarket
  - Test visits are part of a testing campaign, not a "genuine prayer for relief by an aggrieved party"
  - 30 miles "diminishes the likelihood of a continued threat of injury necessitating injunctive relief"
- **11th Circuit:** Two issues on appeal
  - (1) Does Plaintiff's motive behind his past and future visits to the Supermarket preclude him from having standing?
  - (2) If not, has Plaintiff shown a real/immediate threat of future injury to have standing?

Houston: Do Testers Have Standing?

11th Cir: Testers can have standing under parts of Title III

- Legal right to be free from architectural barriers
  - Text of ADA provides no reason to suggest that motive behind attempt to enjoy facilities is relevant
- ADA's broad terms necessarily encompass testers
  - "*No individual* shall be discriminated ... ." 42 U.S.C. § 12182(a)
  - "*Any person* who is being subjected to discrimination on the basis of disability may bring suit." 42 U.S.C. § 12188(a)
- Supreme Court found that testers have standing to challenge the false representation of available housing under the FHA, which prohibited misrepresentation to "any person"

Houston: Do Testers Have Standing?

11th Cir: Tester motive does not foreclose standing

- Congress has required a "bona fide" status in other statutes
  - Testers lack standing to challenge a refusal to rent after making an offer under the FHA, because the statutory language limits this to "bona fide offers"
  - Title III limits certain protections in other sections:
    - Certain protections extend only to "clients or customers of the covered public accommodation"
    - *See* 42 U.S.C. § 12182(b)(1)(A)(i-iv) ("(i) denial of participation, (ii) participation in unequal benefit, and (iii) separate benefit")

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Houston: Does This Particular Tester Have Standing?

Here, Plaintiff had a "real and immediate threat of future injury"

- Two past visits, so Plaintiff returned after encountering barriers
- Despite distance, Plaintiff explained his reason to return
  - Travels to area "on a regular basis" and expects future trips
  - He "definitely" anticipates going to his lawyer's office given his many ADA lawsuits, and passes the market on his way
  - Distance does not make threat of future injury "conjectural"
- No evidence that architectural problems have been fixed, so there is a 100% likelihood that Plaintiff will suffer the alleged injury when he returns
- Note: Court cautions that determining standing for injunctive relief is a "fact-sensitive inquiry"

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Top ADA Cases for 2013

Updates from Top 12 ADA Cases of 2012 Webinar

EEOC v. United Airlines

EEOC v. Henry's Turkey Service

Taxis for All Campaign et al v. Taxi and Limousine Commission et al (formerly Noel v. TLC)

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Supreme Court Denied Request for Review in Reassignment Decision

EEOC v. United Airlines

- **2012:** Reversing its own precedent, the Seventh Circuit joined majority of circuits and held that reassignment to vacant position without competition was a reasonable accommodation under the ADA absent undue hardship or seniority system
- Other circuit: Employers can make reassignment competitive
- We asked whether the Supreme Court would hear case

- **2013:** Supreme Court denied request for review

EEOC v United Airlines, 693 F.3d 760 (7th Cir. 2012), cert. denied 133 S.Ct. 2734 (May 28, 2013)(No. 12–707)

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Jury Trial and Damages in *EEOC v. Henry's Turkey Service*

EEOC sued on behalf of 32 employees with intellectual disabilities re hostile work environment; terms, conditions and privileges of employment; and discriminatory wages/benefits

- **2012: Summary judgment on wage claim ($1.3 million)**
  EEOC v. Henry's Turkey Service, 99 F.Supp.2d 827 (S.D. Iowa 2012)
- We advised to stay tuned for trial in 2013

2013: Jury verdict for EEOC

- Largest award in EEOC history – $240 million in damages
  www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm
- Due to statutory caps, parties agreed to lesser amount, $1.6m

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NYC Taxicab Settlement

- **2012:** Second Circuit found NYC's regulation of taxicabs fell outside scope of Title II. *Noel v. New York City Taxi and Limousine Commission,* 687 F.3d 63 (2d Cir. 2012)
- **April 2013:** Court permitted plaintiffs to amend complaint to include challenges to NYC's selection of the Nissan NV200 van as the exclusive taxi vehicle for the next decade
  - Nissan NV 2000 is not accessible to wheelchair-users
- **December 2013:** Parties announced settlement
  - Phase-in wheelchair accessible medallion cabs so that 50% will be accessible by 2020

More information: www.dralegal.org/impact/cases/noel-et-al-v-taxi-and-limousine-commission-tlc

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

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May 21, 2014

"Qualified Under the ADA: The New Legal Battleground After the ADA Amendments Act"

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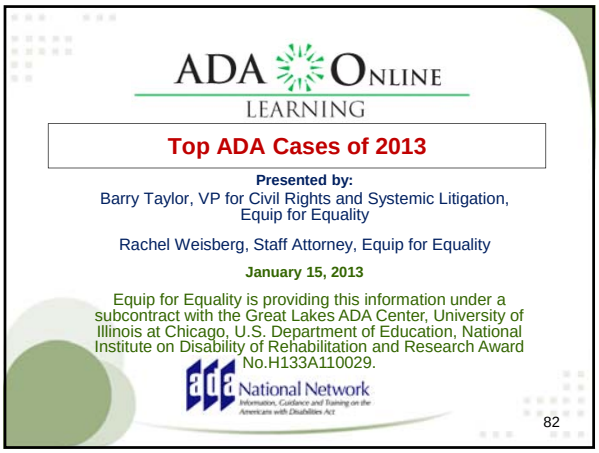
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LEARNING
Top ADA Cases of 2013
Presented by:
Barry Taylor, VP for Civil Rights and Systemic Litigation, Equip for Equality
Rachel Weisberg, Staff Attorney, Equip for Equality
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