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A collaborative program between the

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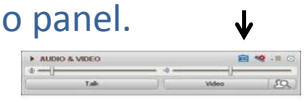

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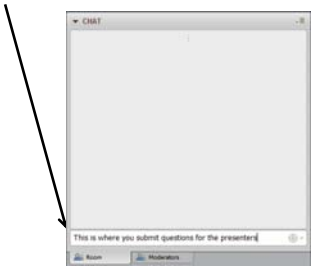

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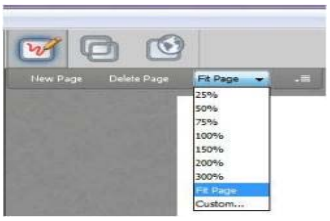

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8

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9

Top ADA Cases Over the Last 25 Years

July 9, 2015
Barry C. Taylor
Rachel M. Weisberg
Equip for Equality

10

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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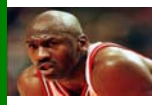
11

A lot of things were different in 1990 when the ADA was passed….

George H.W. Bush was president



Michael Jordan was still 1 year away from his first championship

Oscar winner and Hunger Games star Jennifer Lawrence was born

Vanilla Ice's "Ice Ice Baby" was the Number 1 song in the country

12

Overview – Webinar Content

- Since the ADA was passed in 1990, there have been numerous court cases that have not only impacted the litigants of the case, but had a profound impact on the development of case law and policy under the ADA.
- These decisions will be analyzed, and then followed by a selection of subsequent court decisions applying the precedent.
- Many, but not all of the cases to be discussed, were decided by the U.S. Supreme Court.

13

Top ADA Case

Bragdon v. Abbott – HIV is a disability under the ADA

14

Supreme Court ADA Case: People with HIV Are Covered

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

- **Facts:** A dentist refused to treat a patient with HIV.
- **Holding:**
  - Asymptomatic HIV is a physical impairment under the ADA
  - Reproduction is a major life activity
- **Implications:**
  - Major life activities list in ADA Regulations not exhaustive
  - External, volitional activity not required - major life activity can be internal, autonomous activity
  - No link required between the major life activity and the discrimination

15

Bragdon v. Abbott: Subsequent Case – *Fiscus*

National Kidney Foundation™

***Fiscus v. Wal-Mart Stores, Inc.*,** 385 F.3d 378 (3rd Cir. 2004)

- **Court:** An employee's renal disease substantially limited her ability to cleanse her blood and eliminate body waste, which are "major life activities," citing *Bragdon*.
- **Rationale:** Does not matter if an activity is an internal, autonomous activity or an external, volitional activity.
  - Not required to show activity is a recurrent or daily feature of life.
  - Issue was not the frequency of the activity, but its importance to the life of the individual.
- These activities are obviously "central to the life process" because in its absence an individual will die.

16

Bragdon v. Abbott after the ADA Amendments Act

- **Despite *Bragdon* –** still significant litigation over what is a major life activity – Congress' passage of ADA Amendments Act helps to clarify.

- **ADA Amendments Act**
  - Expands Major Life Activities to include Major Bodily Functions
  - People with HIV can now allege substantial limitation in the major bodily function of their immune system
  - People with HIV no longer have to rely on "reproduction" as major life activity if no outward symptoms

17

ADAAA and Major Life Activities

A non-exhaustive list of major life activities:

caring for oneself	walking & standing
performing manual tasks	reading
seeing	lifting
hearing	bending
eating	speaking
sleeping	breathing
learning	communicating
concentrating & thinking	working

18

ADAAA and EEOC Regulations Major Bodily Functions

New ADAAA Category: Major Bodily Functions

In ADAAA		Added in EEOC Regs
immune system	neurological	special sense organs & skin
normal cell growth	brain	genitourinary
digestive	respiratory	cardiovascular
bowel	circulatory	hemic
bladder	endocrine	lymphatic
reproductive functions		musculoskeletal
		individual organ operation

Lists are not exhaustive - no negative implication by omission

19

Bragdon v. Abbott after the ADA Amendments Act

Horgan v. Simmons,
2010 WL 1434317 (N.D. Ill. April 12, 2010)

- Employee terminated after disclosing his HIV status.
- Claimed discriminatory termination and impermissible medical inquiries.
- **Court:** Applied ADAAA -"functions of the immune system" constitute major life activities under the definition of disability.
- Noted EEOC's proposed regulations list HIV as an impairment that consistently meets the definition of disability.
- Cited Congress instructions that the "question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

20

Top ADA Case

Sutton v. United Airlines – impact of mitigating measures on the definition of disability

21

Supreme Court: Mitigating Measures Part of ADA Disability Analysis

***Sutton v. United Airlines*, 527 U.S. 421 (1999)**

Facts: Twin women sued under ADA after United refused to hire them as pilots because of their inadequate vision. United then claimed they were not covered by the ADA because they were not substantially limited in a major life activity when they wore their glasses.

Issue: Are mitigating measures taken into account when assessing disability?

Supreme Court: Effects of corrective measures must be taken into account when determining if plaintiff has an ADA disability.

22

Impact of *Sutton* case

Impact: Hundreds of ADA cases were dismissed because the plaintiff was deemed to not have a disability when the mitigating measure was taken into account.

Catch 22: Forced people with disabilities to choose between enforcing their civil rights and addressing the manifestations of their disabilities.

EEOC/DOJ Disregarded: Court refuses to give deference to regulations on this issue – no direct authority given by Congress

23

Supreme Court further narrows ADA definition of disability

***Toyota v. Williams*, 534 U.S. 184 (2002)**

Facts: Woman with carpal tunnel syndrome who was denied accommodation and ultimately terminated sued under the ADA.

Supreme Court: Plaintiff did not have an ADA disability because she was not substantially limited in performing manual tasks that are "central to most people's daily lives." Definition of disability is to be "interpreted strictly" to create a "demanding standard."

Impact: Further narrowed who is considered to have an ADA disability

24

Lower Court Decisions Finding No ADA Disability

Impairments found not to be an ADA disability:

- **Intellectual Disability** – *Littleton v. Wal-Mart Stores, Inc.,* 231 Fed.Appx. 874 (11th Cir. 2007)
- **Epilepsy** – *Todd v. Academy Corp*., 57 F.Supp.2d 448 (S.D. Tex. 1999)
- **Bipolar Disorder** – *Johnson v. North Carolina Dep't of Health and Human Services*, (M.D.N.C. 2006)
- **Multiple Sclerosis –** *Sorensen v. University of Utah Hosp*., 194 F.3d 1084 (10th Cir. 1999)
- **Hard of Hearing** – *Eckhaus v. Consolidated Rail Corp*., 2003 WL 23205042 (D.N.J. Dec. 23, 2003)
- **Back Injury** – *Wood v. Crown Redi-Mix, Inc*., 339 F.3d 682 (8th Cir. 2003)

25

Lower Court Decisions Finding No ADA Disability

Impairments found not to be an ADA disability:

- **Vision in Only One Eye** – *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)
- **Post-Traumatic Stress Disorder** – *Rohan v. Networks Presentations LLC*, 375 F.3d 266 (4th Cir. 2004)
- **Heart Disease** – *Epstein v. Kalvin-Miller Intern., Inc*., 139 F.Supp.2d 469 (S.D.N.Y. 2000)
- **HIV Infection** – *Cruz Carrillo v. AMR Eagle, Inc*., 148 F.Supp.2d 142 (D.P.R. 2001)
- **Asthma** – *Tangires v. Johns Hopkins Hosp.,* 230 F.3d 1354 (D. Md. 2000)
- **Cancer –** *Burnett v. LFW, Inc.,* 472 F.3d 471 (7th Cir. 2006)
- **Diabetes** – *Orr v. Wal-Mart,* 297 F.3d 720 (8th Cir. 2002)

26

ADA Amendments Act and Mitigating Measures

- **Congress Responds:** After years of narrow court interpretations of the definition of disability, Congress passed ADA Amendments Act in 2008 to address *Sutton* and *Williams*
- **ADAAA** - Mitigating measures no longer considered in determining disability (rejects Supreme Court's decision in *Sutton*)
- **Exception** - eyeglasses or contacts lenses (definition: "lenses intended to fully correct visual acuity or to eliminate refractive error")

27

Cases Applying ADAAA: Mitigating Measures Are No Longer Considered in Assessing Disability

- **Medicine not considered for high blood pressure -** ***Gogos v. AMS Mech. Systems,*** 737 F.3d 1170 (7th Cir. 2013)
- **Insulin not considered for diabetes -** ***Rohr v. Salt River Project*****,** 555 F.3d 850 (9th Cir. 2009)
- **Pain meds not considered for back impairment -** ***Molina v. DSI Renal, Inc*****.,** 2012 WL 29348 (W.D. Tex. Jan. 4, 2012)
- **Hearing aids not considered** - ***Godfrey v. New York City Transit Authority*****,** 2009 WL 3075207 (E.D.N.Y. Sep. 23, 2009)
- **Prosthetics no longer considered** - ***E.E.O.C. v. Burlington Northern*****,** 621 F. Supp. 2d 587 (W.D. Tenn. 2009)
- **Adderall not considered for ADHD** – ***Geoghan v. Long Island R.R.,*** 2009 WL 982451 (E.D.N.Y. Apr. 9, 2009)

28

Top ADA Case

Chevron USA v. Echazabal – extending direct threat defense to "threat to self"

29

ADA Supreme Court Case: Direct Threat to Oneself

Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002)

- **Facts:** Person with Hepatitis C was not hired as he was considered a danger to himself.
  - Liver condition may be exacerbated by exposure to toxins at work.
  - ADA statute only listed "danger to others" as a defense. 42 USC § 12111(3)
  - EEOC Title I regulations listed "danger to self." 29 C.F.R. §1630.2(r)
- **Holding:** EEOC Regulations upheld – direct threat includes threat to self.
- **Implication:** Ruling may result in paternalistic conjecture by employers, which could undercut personal empowerment for people with disabilities.

30

Does *Echazabal* apply outside employment context?

Is *Echazabal* limited to Title I – employment cases?

- Since Echazabal looked at viability of EEOC regulations, does it also apply to direct threat cases that do not involve employment and are outside of the EEOC's jurisdiction?
- Title III regulations do not include threat to self. 28 § C.F.R. 36.208.
- Courts agree that direct threat does not extend to threat to self outside of Title I. *See* ***Celano v. Marriott International, Inc.***, 2008 WL 239306 (N.D. Cal. 2008) (Threat-to-self defense is not applicable under Title III)

31

Echazabal Applied – *Darnell* & Uncontrolled Diabetes

Darnell v. Thermafiber, Inc., 417 F.3d 657 (7th Cir. 2005)

- Summary judgment affirmed for employer who did not rehire employee with insulin-dependent, Type 1 diabetes
- Pre-employment physical - diabetes not under control.
- **Court:** An employee is not qualified if his disability poses a direct threat to his safety or the safety of others.
  - Uncontrolled diabetes in a manufacturing plant with dangerous machinery could cause serious injury to himself.
  - Employer relied on sufficient objective medical evidence and an individualized assessment in making its decision.
  - Applicant admitted failure to adequately control his diabetes.

32

Echazabal Applied – *Taylor v. Rice*

Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006)

- Plaintiff's application to be an officer with the Foreign Service was rejected due to HIV status.
  - State Department policy prohibited hiring of people with HIV for these positions.
  - Asserted they may need medical treatment that is not available in less-developed countries where they might be stationed.
- **Trial Court** - Relying on *Echazabal,* the trial court held plaintiff would potentially be a direct threat to himself in such a situation.
- **D.C. Circuit Court reversed**
  - Reasonable accommodations may reduce the alleged direct threat so there was no substantial risk of significant harm to his health.

33

Top ADA Case

U.S. Airways v. Barnett – reasonable accommodation of reassignment vs. seniority policies and collective bargaining agreements

34

Reasonable Accommodation of Reassignment & Seniority Policies

U.S. Airways v. Barnett, 535 U.S. 391 (2002)

- **Facts:** Employee sought reassignment to a vacant position, but employer claimed it would violate its policy granting reassignment by seniority, and thus, cause an undue hardship.
- **Supreme Court:** It would ordinarily be unreasonable (*i.e.* an undue hardship) for an employer to violate a consistently enforced seniority policy in order to place a person with a disability in an open position as a reasonable accommodation under the ADA.
- **Case Implications:**
  - Reassignment may be available to a worker despite a seniority policy if the individual can show the seniority provision was not strictly followed in other cases.
  - Calls reasonable accommodations "special" and "preferential"

35

Remaining Reassignment Issue: Competing for Position

- **EEOC :** "Reassignment means that the employee gets the vacant position if s/he is qualified for it."
  - Otherwise, "reassignment would be of little value and would not be implemented as Congress intended."

See EEOC Enforcement Guidance on Reasonable Accommodation

- **Split in Circuits and Supreme Court Primed to Resolve Issue:** It looked like the Supreme Court would resolve the split in the Circuits when it agreed to hear ***Huber v. Wal-Mart Stores, Inc.,*** 486 F.3d 480 (8th Cir. 2007), *cert. dismissed* 552 U.S. 1074 (2008), but the case settled and was dismissed as moot.

36

Reassignment as a Reasonable Accommodation

EEOC v. United Airlines,
693 F.3d 760 (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.

37

Top ADA Case

Cleveland v. Policy Management Systems Corp. – interplay between being "qualified" under the ADA and statements about inability to work as a condition of receiving other benefits.

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38

ADA Supreme Court Case: "Qualified" & Receipt of Benefits

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)

- An SS Beneficiary asserted an ADA Claim
- **Employer** – not qualified under ADA because of statement to Social Security of unable to work – judicially estopped
- **Supreme Court:** People who are disabled under Social Security rules may pursue ADA claims.
- **Basis of the Decision:**
  - ADA considers Reasonable Accommodations
  - Differing Analyses (e.g. SSA has listed disabilities)
  - SSA work incentive rules anticipate working
  - People's conditions may change over time
  - Alternative pleading is allowable

39

Supreme Court's Language in *Cleveland*

- "Pursuit, and receipt of, SSDI benefits does not automatically stop the recipient from pursuing an ADA claim."
- "The two claims do not inherently conflict … There are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side."
- To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.'"

40

Cleveland applied: sufficient explanation given

Smith v. Clark Co. School District
727 F.3d 950 (9th Cir. 2013)

- Teacher filed ADA case with claims of discrimination and failure to accommodate.
- **Employer:** Teacher not qualified because of statements made for pension, FMLA, disability, and private insurance benefits
- **Court:** Teacher provided sufficient explanation re: any inconsistencies between her ADA claim and her benefits applications.

41

Top ADA Case

Fox v. General Motors Corp – disability harassment is actionable under the ADA

42

Disability Harassment and the ADA

Fox v. General Motors Corp.

247 F.3d 169 (4th Cir. 2001)

- **Facts:** Fox sustained back injury and had light-duty work restrictions. Foreman and other employees verbally abused Fox. Foreman instructed employees not to speak to Fox, ostracize him, and not bring him supplies. Foreman made Fox work at a table that was too low, which re-aggravated Fox's back injury. Foreman refused to allow Fox to apply for a truck driver position, which met Fox's medical restrictions and for which he was qualified.
- **Court:** Disability harassment is actionable under the ADA, under the same theory of hostile work environment under Title VII.
- **Jury Verdict:** Jury found that the harassment was severe and pervasive, and awarded Fox $200,000 in compensatory damages, $3,000 for medical expenses, and $4,000 for lost overtime.

43

Disability Harassment and the ADA

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)

Post-*Fox* Disability Harassment

- Courts have uniformly found ADA covers disability harassment. Many have taken strict view on whether harassment was severe or pervasive. For more case analysis, see legal brief at: http://www.ada-audio.org/Archives/ADALegal/Materials/FY2012/September_2012_Legal_Brief.pdf

44

Top ADA Case

Olmstead v. L.C. – unjustified institutionalization is discrimination under the ADA.

45

ADA Supreme Court Case: Community Integration

Olmstead v. L.C., 527 U.S. 581 (1999)

Facts:

- Two women with MI/DD wanted to move from state hospital to community – state agreed they were ready
- Placement was never changed and they filed suit alleging the State's failure to provide community services violated the ADA integration mandate

Holding:

- Unwarranted institutionalization of people with disabilities is a form of discrimination under ADA

46

Olmstead Factors

- **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 evaluating/placing pwds 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.

47

Olmstead applied to private facilities

- Although *Olmstead* involved state-operated institution, courts have applied the case to privately owned facilities that receive state funding
  - ***Disability Advocates Inc. v. Paterson,*** 653 F.Supp.2d 184 (E.D.N.Y. 2009) – Adult Homes for people with MI
  - ***Ligas v. Hamos,*** 2006 WL 644474 (N.D. Ill. Mar. 7, 2006) – Intermediate Care Facilities for people with DD
  - ***Williams v. Quinn,*** 2006 WL 3332844 (7th Cir. Nov. 13, 2006) – Institutions for Mental Diseases
  - ***Colbert v. Quinn,*** 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008) – Traditional nursing homes

48

Olmstead applied to people at risk of institutionalization

Fisher v. Oklahoma Healthcare Auth.,
335 F.3d 1175 (10th Cir. 2003)

- State limited prescription drugs for community programs, but not for nursing home residents.
- Plaintiffs claimed ADA violation because medication limits placed them at risk of institutionalization.
- **Court:** Integration mandate's protections not limited to those currently institutionalized, but also those who may "stand imperiled with segregation" because of state policy.

*See also, **Bruggeman v. Blagojevich**, 324 F.3d 906 (7th Cir. 2003);*

49

Olmstead applied to budget cuts

V.L. v. Wagner, 669 F.Supp.2d 1106 (N.D. Cal. 2009)

- California proposed reducing or terminating in-home support services for elderly and people with disabilities
- Plaintiffs filed suit to prevent service cuts
- **Argument:** Violation of ADA because cuts would place plaintiffs at risk of institutionalization
- **Court:** Budget cuts could violate the ADA's integration mandate
- Preliminary injunction granted which prevents budget cuts from taking place while litigation is pending

50

Olmstead applied to employment

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

- Suit filed by eight individuals with ID/DD who are able and would prefer to work in an integrated employment setting, but instead are segregated in sheltered workshops and denied contact with people without disabilities.
- **Court:** Title II's integration mandate applies to the provision of employment-related services

U.S. v. Rhode Island – 1:14-cv-00175 – (D.R.I. 2014)

- DOJ entered into agreement with RI to move from a system that relies on segregated employment settings to a system where integrated competitive employment is the first option.

http://www.ada.gov/olmstead/olmstead_cases_list2.htm#ri-state

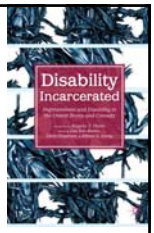
51

Top ADA Case

Pennsylvania Department of Corrections v. Yeskey – Title II of the ADA protects state prison inmates

52

Prisons are covered by Title II of the ADA



Penn. Dept. of Corrections v. Yeskey,
524 U.S. 206 (1998)

- **Facts:** Inmate not allowed in a boot camp program due to hypertension. He filed suit under Title II of the ADA
- **State's argument:** Title II doesn't apply because prisoners don't receive "benefits of the services, programs, or activities"
- **Court:** Title II of the ADA protects state prison inmates. Modern prisons do provide a variety of services, programs and activities that benefit prisoners
- ADA covers some categories that are not expressly mentioned in the Act. This demonstrates "breadth" of ADA, not "ambiguity"

53

Post-*Yeskey Litigation*

***Yeskey* has been applied outside of the prison context.**

e. g. ***Gorman v. Bartch,*** 152 F.3d 907 (8th Cir. 1998) (arrestee transportation is a program or service of the state) and ***McGary v. City of Portland,*** 386 F.3d 1259 (9th Cir. 2004) (compliance with municipal code enforcement can constitute a benefit of the services, programs, or activities of a public entity under Title II.)

***Yeskey* also opened the door to prison reform litigation.**

e.g. ***Disability Law Center v. Massachusetts Dep't of Corrections*****,** 2012 WL 1237760 (D. Mass. 2012) lawsuit brought against Massachusetts alleging that housing mentally ill prisoners in solitary confinement violated the ADA. Settlement agreement reached to address systemic issues. http://www.dlc-ma.org/prisonsettlement/index.htm

54

Top ADA Case

Tennessee v. Lane – States not immune from ADA suits seeking access to courts.

55

Suits for Courthouse Access

***Tennessee v. Lane*,** 541 U.S. 509 (2004)

- Two Tennessee residents with paraplegia were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators.
  - Beverly Jones - court reporter couldn't get to work
  - George Lane – defendant couldn't get to courtroom
- **Tennessee:** Immune from Title II suits under the 11th Amendment.
- Plaintiffs argued that there should at least be liability for injunctive relief under *Garrett* (Title I case).
- Also contended money damages should be available citing a stronger history of discrimination by states under Title II.

56

Courthouse Access – *Tennessee v. Lane*

- **Supreme Court:** Title II abrogated state sovereign immunity - can bring ADA damage cases for denial of court access
  - Extensive history of discrimination regarding public access
  - Money damages may be awarded for lack of access to courts.
  - Also documented the history of state-sponsored discrimination against people with disabilities in many different areas, including voting, education, institutionalization, marriage and family rights, prisoners' rights, access to courts, and zoning restrictions.
- **Recent Extension of *Lane* to others in judicial process:** ***Prakel v. State of Indiana,*** 2015 WL 1455988 (S.D. Ind. Mar. 30, 2015), (court spectator can sue under Title II for denial of interpreter in case where his mother was a criminal defendant.)
- **Open issue:** Does Lane extend beyond court access to other state and local government services?

57

Does *Lane* extend to public education?

Association for Disabled Americans v. Florida International University, 405 F.3d 954 (11th Cir. 2005)

- Students with disabilities filed suit against University for ADA violations including failing to provide physical access, sign language interpreters, effective note takers.
- **Issue:** Can students sue for money damages for a University's ADA violations?
- **Court:** Yes, *Lane* should be extended to education.

  But see, ***Doe v. Univ. of Ill.***, 429 F.Supp.2d 930, (N.D. Ill. 2006); and ***Johnson v. Southern Connecticut State University***, 2004 WL 2377225 (D. Conn. Sept. 20, 2004) (education not fundamental like access to courts)

58

Top ADA Case

Barden v. City of Sacramento – Title II covers sidewalk access

59

Accessible Sidewalks and the ADA

Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002)

- Disabled citizens alleged ADA and Rehab Act violations by the City by failing to install curb ramps in newly-constructed or altered sidewalks and by failing to maintain accessibility for existing sidewalks
- **Court:** City sidewalks are service, program, or activity of City, subject to accessibility regulations
- Because a sidewalk can be characterized as a "normal function of a government entity," public sidewalks fall within the scope of Title II and the Rehab Act.

60

Accessible Sidewalks and the ADA

Willits v. City of Los Angeles,
925 F.Supp.2d 1089 (C.D. Cal. 2013)

- Disabled pedestrians alleged Los Angeles failed to install and maintain accessible pedestrian rights of way.
- **Court:** Public sidewalks are a service, program or activity subject to the ADA and Rehab Act
- State's undue burden defense rejected for both existing sidewalks and newly constructed sidewalks.
- **Settlement:** On 4/1/15, settlement agreement reached that will result in **$1.4 billion** investment in the City's sidewalks over next 30 years. For more details on the settlement see: https://las-elc.org/news/willits-v-city-los-angeles-sidewalk-settlement-announced

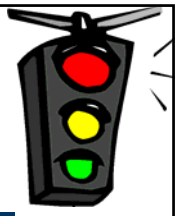
61

Barden extended to on-street parking

Fortyune v. City of Lomita
766 F.3d 1098 (9th Cir. 2014)

- Individual who uses a wheelchair sued the City for failing to provide accessible on-street parking
- City filed motion to dismiss arguing that the ADA doesn't require on-street parking (federal accessibility standards lack specific requirements)
- **Court:** Title II of the ADA requires local government to provide accessible on-street parking even in the absence of regulatory design specifications for on-street parking facilities, as it is a "normal function of a government entity." No violation of due process since Department of Justice had already put state and local governments on notice.

62



Barden extended to accessible traffic signals

Scharff v. County of Nassau

2014 WL 2454639 (E.D.N.Y. June 2, 2014)

- Individuals who are blind, deaf-blind, or have other visual impairments challenged County's failure to install Accessible Pedestrian Signals (APS)
- **Court:** Installing/maintaining pedestrian crossing signals is a normal function of the County and falls within Title II
  - ADA/Rehab Act may require APS, even though Access Board's guidelines have not yet been promulgated
  - Trial required on County's defenses (fundamental alteration, structural impracticability, technical infeasibility)

63

Top ADA Case

Brooklyn Center for Independence v. Bloomberg – emergency preparedness is covered by the ADA

64

Emergency Preparedness

Brooklyn Center for Independence v. Bloomberg
980 F.Supp.2d 588 (S.D.N.Y. 2013)

- Alleged that NYC failed to plan for the needs of people with disabilities in large scale disasters
- 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 evac of pwds from high-rise bldgs
  - Lacks reliable and effective communication systems

65

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
- **DOJ's statement of interest: www.ada.gov/brooklyn-cil-brief.doc**

66

Settlement Agreement Approved 2015

- City to hire a **Disability and Access and Functional Needs Coordinator** – lead EE responsible for overseeing plans
- **Disability Community Advisory Panel** – provide feedback on a regular basis regarding City's plans/proposed revisions
- By Sept '17, City will have at least 60 shelters that are physically and programmatically accessible
- By Aug '17, City to create a **Post-Emergency Canvassing Operation** - survey households after a disaster to assess/identify needs of pwd by going door-to-door and send resource requests (including food, water, electricity, med care, med equipment).
- Develop accessible transportation plans during emergencies
- **NYC/ADA High Rise Building Evacuation Task Force** to create a work plan, which will be implemented in next 3 years

67

http://www.dralegal.org/bcid-v-bloomberg

Top ADA Case

California Council of the Blind v. County of Alameda **-** ADA provides right for people with disabilities to vote privately and independently

68

Right to Vote Privately and Independently

California Council of the Blind v. Cty. of Alameda

985 F.Supp.2d 1229 (N.D. Cal. 2013)

- **Issue:** Do voters have a right to vote privately/independently? Can county comply with ADA by having third-parties assist?
- **Court:** ADA/Rehab Act protections include meaningful access to private and independent voting
  - One of the "central features" and "benefits" of voting is "voting privately and independently"
  - Voters should be given equal opportunity
  - Relying on 3rd 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

69

Voting: Physical Access

Disabled in Action v. Bd. of Elections in the City of NY

752 F.3d 189 (2d. Cir. 2014)

- **Plaintiffs:** Failure to provide accessible polling places (80% of polling places had a least on barrier)
- **City had argued:** No alternative facilities exist
- **Dist. Ct:** NYC violated ADA/504; Must implement remedial plan
- **2nd Circuit:** Affirmed - City failed to provide "meaningful access" Cites DOJ - Inaccessibility of existing facilities is not an excuse, but rather, a circumstance that requires a public entity to take reasonable active steps to ensure compliance with its obligations under Section 504 and Title II.

70

Top ADA Case

Enyart v. National Conference of Bar Examiners – Accommodations on examinations require "best ensure" standard

71

Best Ensure Standard Adopted for Licensing Examination

Enyart v. National Conference of Bar Examiners, 630 F.3d 1153 (9th Cir. 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."

72

Recent Professional Licensing ADA Decisions

Enyart v. Nat'l Conference of Bar the Examiners (cont.)

- **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.

73

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 was admissible.
  - Providing the plaintiff with the requested accommodations would not pose an undue burden on the NCBE.

74

"Best Ensure" Standard Extended to DOJ Consent Decree with LSAC

The Dept. of Fair Employment and Housing v. LSAC, Inc.
896 F.Supp.2d 849 (N.D. Cal. 2012)

- Class action on behalf of people with disabilities in California who had been denied testing accommodations by the LSAC
- Oct. 18, 2012: DOJ intervened in the case, which expanded the case to a nationwide pattern or practice lawsuit
- Allegations in the lawsuit included:
  - 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

75

High Stakes Testing: DOJ Consent Decree with LSAC

Terms of Agreement (2014)

- LSAC to cease flagging test scores of those given extra time
- Streamline evaluation of testing accommodations
  - Automatically granting most accommodations if candidate shows that she previously received same on past standardized exam
- Implementing additional best practices for reviewing/evaluating requests as recommended by panel of experts (created by parties)
- LSAC to pay $7.73 million to compensate approximately 6,000 test-takers from past 5 years (+ civil penalties)

76

www.ada.gov/dfeh_v_lsac/lsac_consentdecree.htm

Top ADA Case

Nat'l Ass'n of the Deaf v. Netflix, Inc.

– ADA accessibility requirements extend to internet-based businesses.

77

Background: Does the ADA Apply to Websites?

- Title III applies to public accommodations (12 categories)
- **Statute:** No mention of websites/Internet
- **Courts:** Differing opinions over the past 20 years
  - No physical nexus is required. ***Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Association of New England, Inc.***, 37 F.3d 12 (1st Cir. 1994) (non-website case)
  - Website with a nexus to a physical place of public accommodation must be made accessible. ***Rendon v. Valleycrest Productions, Ltd.***, 294 F.3d 1279 (11th Cir. 2002) (non-website case)
  - ADA applies to the goods and services "of" a place of public accommodation rather than only the goods and services provided "at" or "in" a place of public accommodation. ***Nat'l Fed'n of the Blind v. Target Corp.***, 452 F.Supp.2d 946 (N.D. Cal. 2006)

78

ADA and Internet-Only Businesses

Nat'l Ass'n of the Deaf, et al, v. Netflix, Inc.

869 F. Supp. 2d 196 (D. Mass. 2012)

- Plaintiffs asserted that Netflix's "Watch Instantly" streamed content without providing closed captioning in violation of Title III of the ADA
- **Netflix**: No physical space, so not place of public accommodation
- **DOJ:** filed a statement of interest, included a number of strong statements:
  - Netflix is subject to ADA, even if it has no physical structure
  - Fact that the regulatory process is not complete does not support any inference that web-based services are not already covered by the ADA
  - DOJ has long interpreted Title III to apply to web services

www.ada.gov/briefs/netflix_SOI.pdf

79

Netflix Litigation

Court denied Netflix's motion to dismiss

- Relied on 1st Circuit's decision in *Carparts*, which held that "'places of public accommodation' are not limited to 'actual physical structures'"
- Examples were not intended to be exhaustive, and that the ADA was intended to adapt to changes in technology
- Netflix "falls within at least one, if not more, of the enumerated ADA categories," identifying "service establishment," "place of exhibition or entertainment," and "rental establishment"

80

Netflix Consent Decree

Parties settled after court's decision

- Netflix agreed to provide captioning for 100% of its content by 2014

Press Release: http://dredf.org/captioning/netflix-press-release-10-10-12.pdf

Consent Decree: http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf

- But see, ***Cullen v. Netflix, Inc.***, 880 F. Supp. 2d 1017 (N.D. Cal. 2012)
  - Recognized conflicting opinion about *Netflix* in MA, but "must adhere to Ninth Circuit precedent" which defined "place of public accommodation" to be a physical place

81

Netflix decision applied to recent case

Scribd
Publish Yourself Online

National Federation of the Blind v. Scribd, Inc.
2015 WL 1263336 (D. Vt. Mar. 19, 2015)

- **Plaintiffs:** Blind people unable to access Scribd's digital library via the website or mobile app.
- **Defendant:** Scribd is not a public accommodation because ADA does not apply to website operators whose goods or services aren't available at physical location open to public.
- **Court:** Denies Scribd's motion to dismiss. Citing *Netflix,* court held that to exclude from the ADA businesses that sell services via the internet would severely frustrate Congress' intent that people with disabilities fully enjoy the goods, services, privileges, and advantages available to other members of the general public.

82

Website Access

- DOJ is expected to issue a Notice of Proposed Rulemaking ("NPRM") soon
- DOJ has stated that the NPRM will propose the scope of the obligation and propose the technical standards necessary to comply with the ADA.
- Legal Brief & Legal Webinar on Website Access Issues: www.ada-audio.org/Archives/ADALegal/index.php?app=2&type=transcript&id=2014-09-22

83

Top ADA Case

Bank of America Agreement – using structured negotiations to achieve systemic access for people with disabilities

84

Bank of America Agreement Through Structured Negotiations

- Structured Negotiations - alternative to litigation to achieve systemic change
- Lainey Feingold and Linda Dardarian pioneered concept and typically represent American Council of the Blind
- 2001 agreement with Bank of America was one of the first Structured Negotiations Agreement and resulted in installation of Talking ATMs so blind people could operate ATMs privately and independently.
- Many subsequent agreements reached with other banks, focusing on ATMs, websites and alternative formats

http://lflegal.com/2001/09/bank-of-america-interim-national-agreement/

85

Structured negotiations expanded beyond banks to other industries

American Cancer Society	Rite Aid
American Express	7-Eleven
Best Buy	Staples
Charles Schwab	Target
Cinemark	Trader Joe's
CVS	UCSF Medical Center
Dollar General	Wal-Mart
Major League Baseball	Weight Watchers
Radio Shack	WellPoint

http://lflegal.com/category/settlements/

86

ADA Resources

- **ADA Disability and Business Tech. Asst. Center** www.adata.org/dbtac.html
- **Job Accommodation Network** - www.jan.wvu.edu
- **Equal Employment Opportunity Commission** www.eeoc.gov
- **Department of Justice –** www.ada.gov
- **National Disability Rights Network (NDRN) -** www.ndrn.org

87

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- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA Center at: 312-413-1407 or webinars@ada-audio.org
- This slide will be repeated at the end.

88

Top ADA Cases Over the Last 25 Years

QUESTIONS?

89

Session Evaluation

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90

Next ADA Legal Webinar Session

September 16, 2015

Effective Communication and the ADA

Speaker: Barry Taylor and Rachel Weisberg, Equip for Equality

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91