

ADA AUDIO

Conference

ADA NATIONAL NETWORK

ADA Audio Conference Series November 18, 2014

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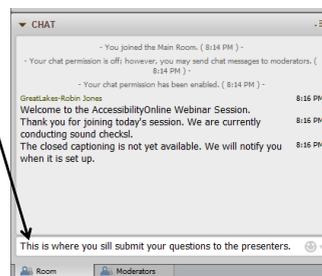
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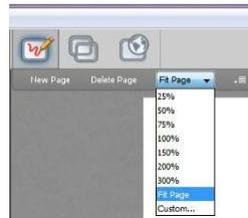
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ADA Case Law Update

Presenters:
Barry C. Taylor
Rachel M. Weisberg
Equip for Equality

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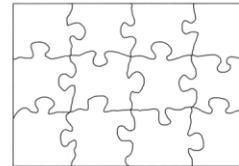
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Training Outline: Definition of Disability & Title I



Definition of Disability

- Recent Interpretations of the ADA
- Obesity & Pregnancy

Title I

- Qualified & Essential Functions
- Reasonable Accommodations
- Workplace Standards
- Medical Exams and Inquiries
- Hostile Work Environment
- Wellness Programs

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Training Outline: Title II & Title III

Title II

- Olmstead & Supported Employment
- Mental Health Questions on Licensing Applications
- Accessible On-Street Parking & Pedestrian Signals
- Emergency Preparedness
- Voting

Title III

- Architectural Access
- Higher Education
- Service Animals
- High Stakes Testing
- Website Access

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Definition of Disability: Legal Update

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ADAAA and the Definition of Disability



Gogos v. AMS Mechanical Systems 737 F.3d 1170 (7th Cir. 2013)

- Plaintiff with a history of controlled high blood pressure worked as a pipe welder for 45 years
- Temporary blood pressure spike causing intermittent vision loss
- Requested leave to seek immediate medical treatment because his eye was red – supervisor said OK
- Told foreman that he was going to the hospital because his “health [ha]s not been very good lately” – Plaintiff fired on the spot
- **District court** : Dismissed case – no ADA disability
- **Appellate court**: Found for Plaintiff – analyzed various provisions
 - ❖ One of the first appellate court decisions substantively applying the ADAAA

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Gogos: Definition of Disability



Short Term Impairments: Short-term blood pressure spike and vision loss can be disabilities

- App to 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.”

Episodic conditions: Even if Plaintiff’s blood pressure spike and vision loss are episodic, can be disabilities

- EEOC lists hypertension as an example of an impairment that may be episodic

Major Bodily Function: Blood pressure spike and intermittent blindness substantially limit two major bodily functions - eyesight and circulatory function. Court easily accepts concept

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Gogos: Definition of Disability

Mitigating Measures: Plaintiff's chronic blood-pressure condition could also qualify as a disability

- Must disregard ameliorative effects of mitigating measures
- Cited App. to EEOC regs: Language directly "on point" regarding an individual who takes medication for hypertension and who would have substantial limitations to cardiovascular and circulatory system w/o meds

Other elements of a prima facie case:

- Qualified: Plaintiff has 45 years of experience
- Adverse action: He was fired immediately after disclosure

Current status: Pending in district court

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ADAAA: Recent Substantive Appellate Court Decisions



Parada v. Banco Industrial De Venezuela 753 F.3d 62 (2d Cir. 2014)

- Due to a back injury, Parada could not sit for long periods
- **District court:** As a matter of law, an impairment limiting the ability to sit for long periods of time is not a disability
- **2nd Cir:** Reversed and remanded
 - ❖ EEOC lists "sitting" as a major life activity
 - ❖ No "bright-line tests" – fact-specific inquiries for ADA
 - ❖ Recognizes the inability to sit for even an abbreviated period (15-30 min) is more likely a substantial limitation than the inability to sit for "prolonged periods"

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ADAAA: Recent Substantive Appellate Court Decisions

Mazzeo v. Color Resolutions International, LLC 746 F.3d 1264 (11th Cir. 2014)

- Employee had herniated disc and torn ligaments in his back
- Pain down his lower back, spreading to his right leg, and impacting his ability to walk, sit, stand, bend, run, and lift heavy objects
- **11th Cir:** Reversed and remanded district court opinion: employee established an ADA-qualifying disability
 - ❖ Treating physician submitted an affidavit sufficient to survive summary judgment
 - ❖ No need for a more detailed discussion

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Obesity as a Disability

Whittaker v. America's Car-Mart 2014 WL 1648816 (E.D. Mo. April 24, 2014)

- Plaintiff alleged that he has severe obesity, which substantially limits his ability to walk
- Alleges that he is “regarded as” having a disability
- Alleges no other underlying physiological disorder or condition
- Court denied motion to dismiss
 - ❖ Severe obesity can be a physical impairment within the meaning of the ADA

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Obesity as a Disability: Other Cases / Guidance

- ***Powell v. Gentiva Health Services, Inc.*, 2014 WL 554155 (S.D. Ala. Feb. 12, 2014)**
 - ❖ EE was “overweight” but not diagnosed w/ “morbid obesity”
 - ❖ EE’s testimony established that her weight caused no limitations, either in her job or day-to-day activities
 - ❖ Court granted summary judgment for the ER
- ***EEOC Compliance Guidelines, § 902.2(c)(5)***
 - ❖ “Being overweight, in and of itself, is not generally an impairment... On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment.”

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Pregnancy as a Disability

EEOC’s Recent Guidance:

- Pregnancy itself is not a disability, but employees may have pregnancy-related impairments that qualify under the ADA.
 - ❖ **Ex: Pregnancy-related carpal tunnel syndrome, gestational diabetes, pregnancy-related sciatica, and preeclampsia.**
- Examples of possible reasonable accommodations:
 - ❖ Redistributing marginal/nonessential functions (lifting)
 - ❖ Modified work schedule due to severe morning sickness
 - ❖ Telework for employee on bed rest
 - ❖ Granting additional unpaid leave
 - ❖ Purchasing or modifying equipment (stool)

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www.eeoc.gov/laws/types/pregnancy_guidance.cfm

Pregnancy as a Disability

- ***Price v. Uti Integrated Logistics, LLC*, 2013 WL 798014 (E.D. Mo. March 5, 2013)**
 - ❖ EE's pregnancy-related complications required bed rest
 - ❖ Court denied MSJ – held that under ADAAA's expanded standard, there was evidence that EE's physiological disorders/conditions affected her reproductive system
- ***Wonasue v. Univ. of Maryland Alumni Association*, 984 F.Supp.2d 480 (D. Md. 2013)**
 - ❖ EE failed to establish that her pregnancy was a disability
 - ❖ Experienced morning sickness (hyperemesis) but permitted to return to work w/o restriction.
 - ❖ Restrictions: 1 day bed rest; anti-nausea meds; vitamins

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Title I of the ADA

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Qualified: Attendance & Punctuality as Essential Functions



Many courts: Attendance/timeliness is an essential function

- Recent cases reminding courts that issue is still fact-specific:
 - ❖ ***EEOC v. AT&T Corporation*, 2013 WL 6154563 (S.D. Ind. Nov. 20, 2013)** (summary judgment denied on whether attendance was an essential function b/c AT&T had 22 formal leave of absence policies and EE's job description was silent, even though manager testified that attendance was essential and written warning stated so)
 - ❖ ***McMillan v. City of New York*, 711 F.3d 120 (2d Cir. 2013)** (reversed summary judgment on whether timeliness was an essential function b/c City had flex-time policy, had accommodated EE for years)

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Qualified: Working a Regular and Predictable Schedule

Solomon v. Vilsack

--- F.3d ---, 2014 WL 4065613 (D.C. Cir. Aug. 15, 2014)

- Budget analyst with depression requested to work a "maxiflex" schedule as a reasonable accommodation – request was denied
 - ❖ Maxiflex schedule: EE may vary number of hours worked on a given day or week
- **Dist. Ct:** Maxiflex schedule is unreasonable as a matter of law
- **D.C. Cir:** Reversed and remanded
 - ❖ "[R]are that any particular type of accommodation will be categorically unreasonable... This case is no exception."
 - ❖ Analyst provided evidence that short deadlines are infrequent, and can still be met on a maxiflex schedule
 - ❖ She had never missed a work deadline in the past
 - ❖ Another EE in similar position had maxiflex schedule

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Qualified: Physical Presence as an Essential Function



EEOC v. Ford Motor Company

752 F.3d 634 (6th Cir. 2014)

- **8/29/14:** Opinion vacated; rehearing *en banc* granted
- Resale steel buyer had severe IBS requested to telework
- **6th Cir:** While attendance may be an essential requirement of most jobs, technology has advanced such that attendance at the workplace no longer is assumed to mean attendance at the employer's physical location.
 - ❖ The "law must respond to the advance of technology in the employment context . . . and recognize that the 'workplace' is anywhere that an employee can perform her job duties."
 - ❖ Here, most communication was via conference call; job did not actually require face-to-face interaction

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Qualified/Accommodations: Job Restructuring



Rorrer v. City of Stow

743 F.3d 1025 (6th Cir. 2014)

- Firefighter was terminated after he lost his vision in one eye and could no longer operate fire apparatus
- **6th Cir:** Issue of fact whether operating fire apparatus/other vehicle was an essential function
 - ❖ Employer judgment is not "conclusive" – district ct. erred by only considering City's position
 - ❖ Employer cited Nat'l Fire Protection Ass'n guidelines, but it's disputed whether these guidelines were adopted
- May be a reasonable accommodation to reassign task
 - ❖ Evidence that task could have "easily" been performed by colleagues – marginal task

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Qualified/Accommodations: Job Restructuring

Kauffman v. Petersen Health Care VII

--- F.3d ---, 2014 WL 5285979 (7th Cir. Oct. 16, 2014)

- Hairdresser at nursing home had a pushing restriction following bladder reconstructive surgery
- **District ct:** Pushing residents was an essential function
- **7th Cir:** Reversed/remanded - issue of fact
 - ❖ While ER said it was 65% of job, EE calculated 9% (2 hrs/wk)
 - ❖ Assuming EE is correct, the demand on other EE's time, divided over the rest of the staff (inc. orderlies), would be trivial
 - ❖ ER didn't engage in the interactive process
 - ❖ Disability-biased motive: ER said "we just don't allow people to work with restrictions."
- **Concurring judge:** Time spent was 1 of many factors to consider

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Qualification Standards: Properly Applied?

Samson v. Fed. Exp. Corp.

746 F.3d 1196 (11th Cir. 2014)

- Employee failed DOT medical exam due to his diabetes
- ER argued: Federal Motor Carrier Safety Regulations (FMCSR) required DOT medical exam for drivers who transport property or passengers in interstate commerce
- **11th Circuit:**
 - ❖ FMCSR didn't apply to the employee's position so not a per se defense
 - ❖ FedEx failed to show that the qualification standard was job-related and consistent with business necessity

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Workplace Standards: Properly Applied?



EEOC v. Walgreen Co.

--- F.Supp.2d---, 2014 WL 1410311 (N.D. Cal. April 11, 2014)

- EE ate a \$1.39 bag of chips during hypoglycemic attack and was terminated for violating “anti-grazing” rule
- **Court:** Rejected argument that it is never a reasonable accommodation to accommodate employee theft
 - ❖ **Cites EEOC guidance:** ERs may discipline EEs for violating a uniformly applied conduct rule, so long as the conduct rule is *job-related and consistent with business necessity*
 - ❖ Q for jury whether this rule met standard
 - ❖ Under 9th Circuit law, misconduct resulting from a disability is considered as part of a disability

Settlement: www1.eeoc.gov/eeoc/newsroom/release/7-2-14b.cfm

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Medical Exams: What are they and when are they permissible?



Kroll v. White Lake Ambulance Authority

763 F.3d 619 (6th Cir. Aug. 19, 2014)

- EMT req'd to seek counseling as condition of employment
 - ❖ Uniformly called a “good” EMT
 - ❖ After affair with co-worker, found crying in parking lot, in tears after shift, allegations of arguing/texting while driving 1 time, and ignoring request to administer oxygen 1 time
- **Earlier decision:** Requiring counseling as a condition of employment could be a medical exam [691 F.3d 809 \(6th Cir. 2012\)](#)
- **Issue here:** Was this medical exam job-related and consistent with business necessity?
 - ❖ Dist. ct said yes and granted summary judgment to Def.

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What is a Medical Exam and When is it Permissible?

- ER burden - based on reasonable belief and objective evidence
 - ❖ **EE's ability to perform essential functions is impaired**
 - ❖ **EE poses a direct threat to himself or others**
- **6th Cir:** Reversed & Remanded – Reasonable jury could find:
 - ❖ “Aberrant emotional behavior” is relevant only to the extent that it interfered with her ability to do her job
 - ❖ Record shows supervisor knew of only 1 incident of substandard care (oxygen) and 1 incident of cell phone use
 - ❖ Isolated moments of unprofessional conduct do not support conclusion that EMT was experiencing an “emotional or psychological problem that interfered with her ability” to do job
 - ❖ Special circumstances for public safety officers – even still, jury may find isolated incidents insufficient

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Compare *Kroll to Coursey*



Coursey v. Univ. of Maryland Eastern Shore 577 Fed. Appx. 167 (4th Cir. July 1, 2014)

- University professor placed on paid leave until he submitted to a mental health evaluation / fitness-for-duty
- **Issue:** Was medical exam job-related and consistent with business necessity?
- **4th Cir:** Affirmed decision – Yes, University met standard
 - ❖ Position required Prof to instruct, supervise, and interact with students in a professional and non-threatening way
 - ❖ University received 12+ complaints from students about his violent outbursts, erratic and inappropriate behavior
 - ❖ **Note:** University conducted investigation into complaints

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Disability Harassment



EEOC v. Mont Brook, Inc.

2014 WL 2119862 (N.D. Ill. May 20, 2014)

- Employee w/ physical disability filed a hostile work environment claim
- Allegations:
 - ❖ Co. president called her “a cripple” on 2 occasions
 - ❖ Mocked her by imitating the way that she walked
 - ❖ When plaintiff objected, called her a “hysterical basket case”
- Court denied Defendant’s MTD for lack of sufficiently pervasive or severe conduct.
 - ❖ Allegations met the necessary standard of plausibility.
 - ❖ Noted: A hostile work environment claim can be supported by isolated incidents that are sufficiently severe.

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Wellness Programs & the ADA: Stay Tuned...



Recent EEOC complaints – all filed since August 2014

- ***EEOC v. Orion Energy Sys., 14-cv-01019 (E.D. Wis.)***
 - ❖ EEs that declined to participate in wellness program were required to pay 100% of healthcare premiums. Also, EE fired.
- ***EEOC v. Flambeau Inc., 14-cv-00638 (W.D. Wis.)***
 - ❖ EEs that declined to submit to biometric testing and a health risk assessment were threatened with cancellation of medical insurance, unspecified disciplinary action, and requirement to pay full premium of health insurance.
- ***EEOC v. Honeywell, 14-cv-4517 2014 WL 5795481 (D. Minn. Nov. 6, 2014)***
 - ❖ EEs that fail to undergo screening are assessed a surcharge, which combined with other penalties, can total up to \$4,000.

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Title II

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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 living in the community, but who are at risk of institution
 - ❖ People living in state-funded, but privately owned institutions
 - ❖ Most recently, segregation in sheltered workshops

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Employment and *Olmstead*

U.S. v. Rhode Island

1:14-cv-00175 (D.R.I. 2014)

- DOJ entered into agreement with RI as state's system violates the ADA by over-relying on segregated settings, including sheltered workshops and facility-based day programs, to the exclusion of integrated alternatives.
- Under the agreement, RI will provide supported employment placements to approximately 2,000 individuals, including
 - ❖ at least 700 people currently in sheltered workshops,
 - ❖ at least 950 people currently in facility-based non-work programs, and
 - ❖ approximately 300-350 students leaving high school.

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Employment and *Olmstead*

U.S. v. Rhode Island

1:14-cv-00175 – (D.R.I. 2014)

- Agreement Provides:
 - ❖ sufficient services to support normative 40 hour work week,
 - ❖ expectation that individuals will work, on average, in a supported employment job at competitive wages for at least 20 hours per week.
 - ❖ State will provide transition services to approximately 1,250 youth between 14 and 21 intended to lead to integrated employment outcomes after secondary school.

To View Letter of Finding, Complaint, Agreement, Order, Press Release and Fact Sheet Go To:

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

Recent *Olmstead* Settlements

- ***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.ada.gov/olmstead/olmstead_cases_list2.htm#wood (Court approved consent decree on 2/12/2014)
- ***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
www.bazelon.org/News-Publications/Press-Releases/7.22.2013Landmark-New-York-City-DAI-Settlement.aspx

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Licensing Applications: Mental Health Questions

DOJ Settlement/Findings Letter with Louisiana Supreme Court

- Louisiana asked Qs about mental health on character and fitness licensing applications for attorneys
- **DOJ:** Issued a findings letter (2/5/14)
 - ❖ www.ada.gov/louisiana-bar-lof.pdf
 - ❖ Title II standard: Eligibility criteria must be “necessary”
 - ❖ State’s Qs: Not necessary to assess the applicants’ fitness
 - ❖ Requested info about “diagnoses” rather than “conduct”
 - ❖ Problem with practice of admitting individuals with certain mental health disabilities on a conditional basis

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Licensing Applications: Mental Health Questions

- DOJ/Louisiana Supreme Court: Settlement (8/14/14)
 - Some settlement terms:
 - ❖ LA will revise screening Qs to focus on conduct or behavior
 - ❖ Will ask only about how condition/impairment currently affects applicant's ability to practice law in a competent, ethical and professional matter or how it explains otherwise disqualifying conduct
 - ❖ Re-evaluates prior/pending applicants who disclosed mental health disabilities
 - ❖ Pay \$200,000 to compensate affected individuals
- www.ada.gov/louisiana-supreme-court_sa.htm

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Query: Possible impact for other professions/states?

Accessible 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 MTD – ADA doesn't require on-street parking (UFAS, 1991 and 2010 stds lack specific requirements)
- **Issue:** Does Title II of the ADA require local gov'ts to provide accessible on-street parking in the absence of regulatory design specifications for on-street parking facilities?
- **Holding:** Yes, it does

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Accessible On-Street Parking

- Title II is broad and includes “anything a public entity does”
- Similar to public sidewalks (no implementing regs) but found to be subject to Title II
- Lack of specific regulation cannot eliminate a statutory obligation
- Regs mandate program access for all normal government functions, including on-street parking **28 CFR 31.150**
- Each facility constructed or altered after June 26, 1992 must be “readily accessible to and usable by individuals with disabilities” – extends to on-street parking. **28 CFR 31.151**
- Cites DOJ TA manual, DOJ amicus brief, other publications

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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)
- Both parties moved for summary judgment; denied for both
- **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)

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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

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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

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Proposed Settlement Agreement Fairness Hearing Scheduled for Feb. 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

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www.dralegal.org/sites/dralegal.org/files/casefiles/settlementstip.pdf

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 = 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

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Voting: Another Recent Case

Disabled in Action v. Bd. of Elections in the City of NY 752 F.3d 189 (2d. Cir. 2014)

- **Dist. Ct:** NYC violated ADA/504; Must implement remedial plan
 - ❖ 1 poll worker is designated ADA Coordinator
 - ❖ Trained and given checklist to document access complaints
 - ❖ Monitors visit polling site 2x on election day to assess access, assist on-site poll-workers to remedy access barriers, and document results
 - ❖ City to use third-party w/ expertise in voting access to survey sites and draft report
- NYC Appealed
- **2nd Circuit:** Affirmed decision

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Voting: NYC Case

- **2d Cir:** City failed to provide “meaningful access”
 - ❖ Designating inaccessible sites (80% had at least 1 barrier)
 - ❖ Failing to assure accessibility through temporary equipment, procedures, and policies on election days
 - ❖ Relevant benefit = Opportunity to fully participate in voting, including option to cast a private ballot on election day
- **City argued:** No alternative facilities exist
 - ❖ **Court:** 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.

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Voting: NYC Case

- **City argued:** Provides reasonable accommodations for voters by reassigning to accessible poll sites; and remedying barriers as they are made aware of them
 - ❖ **Court:** Nothing in the record to show this provides meaningful access (own evidence shows that ad hoc policy of remedying barriers is inadequate)

New DOJ guidance document:

- Solutions for Five Common ADA Access Problems at Polling Places - www.ada.gov/ada_voting/voting_solutions_ta/polling_place_solutions.htm

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Title III

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Architectural Access



Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co 765 F.3d 1205 (10th Cir. 2014)

<http://creeclaw.org/hollister-stores-ccdc-v-bercrombie-fitch/>

- Plaintiffs challenged entrance of Hollister stores
- Retailer used a raised porch to give it the “look and feel of a Southern California surf shack”
- Two doors on the side of the porch lead to the same area upon entry
- **District court:** Granted summary judgment for Plaintiffs and certified class
- **10th Cir (many amicus, including from DOJ):**
 - ❖ ADA testers can still have standing under ADA and these particular plaintiffs had standing
 - ❖ Affirmed class certification

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Architectural Access

Rejected 3 reasons district court found for plaintiff:

- **General ADA violation:** Violation by providing a “different or separate” accommodation not in the “most integrated setting”
 - ❖ **10th Cir** - No Title III violation when design doesn’t violate 1991/2010 standards. Must be assessed through design stds.
- **Space:** Porch is a “space” required to be accessible under design standards
 - ❖ **10th Cir** - Distinguishes accessible spaces and spaces – not all spaces are required to be accessible
- **Design standards:** Noncompliance with ‘91 requirement that accessible entrance shall be the one used by the majority of ppl
 - ❖ **10th Cir** - 2010 stds eliminate the “majority” of ppl req; even if they did not, no evidence that the “majority” of ppl use porch

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Effective Communication: Higher Education



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

- Student requested various accommodations - CART for lectures, cued speech interpreter for labs, FM system for small groups
- Creighton provided some accommodations, but not all
- Michael borrowed \$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
- **District court:** Granted Creighton's MSJ – not excluded
- **8th Circuit:** ADA/Rehab Act requires Creighton to provide necessary auxiliary aids and services. Lower ct. erred when holding that “necessary” requires a showing that individual was “effectively excluded” to warrant protection

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Argenyi: Eighth Circuit's Assessment of Law



- 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
- **Jury trial in August 2013** - Jury found for Michael
 - ❖ Creighton University discriminated against Michael in violation of the ADA and the Rehab Act + no undue burden
 - ❖ No intentional discrimination (no \$\$ for Michael)
- **Judge** ordered injunctive relief (but no reimbursement of \$\$)
- Current status

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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Accessible Course Materials: 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/1116002-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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Service Animals: Permissible Inquiries



Hurley v. Loma Linda University Medical Center 2014 WL 580202 (C.D. Cal. 2014)

- Plaintiff, an individual with PTSD who uses a service animal, visited a relative at the hospital
- Officer made multiple requests for service animal credentials
- Plaintiff became very agitated – raised her voice, used profanity, became confrontational and hysterical. Asked to leave hospital
- **Court:** Hospital violated Title III by requesting documentation
 - ❖ Public accommodation can only ask 2 Qs; no documentation
 - ❖ Ct questioned this reg (“often causes more harm than good”)
 - ❖ Rejected argument that it could ask more Qs because disability wasn’t apparent
 - ❖ Awarded \$4,000 in damages under CA state law

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High Stakes Testing: 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

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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 add'l 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)

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www.ada.gov/dfeh_v_lsac/lsac_consentdecree.htm

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)

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Different Standards = Different Results

- **No physical nexus is required.** *Nat'l Ass. of the Deaf v. Netflix*, 869 F.Supp.2d 196 (D. Mass. 2012)
 - ❖ Suit against Netflix for failing to provide equal access to its “Watch Instantly” website
 - ❖ **Court:** Rejected Netflix’s argument that its website was not a “place of public accommodation” under Title III
 - ❖ **Settlement:** Netflix to provide captioning on 100% of its streaming videos within 2 years
- **Physical nexus is required.** *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012)
 - ❖ Recognized the conflicting opinion about *Netflix* in MA, but held that it “must adhere to Ninth Circuit precedent” which defined “place of public accommodation” to be a physical place

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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.
- Title II:
 - ❖ www.reginfo.gov/public/do/eAgendaViewRule?publd=201404&RIN=1190-AA65
- Title III
 - ❖ www.reginfo.gov/public/do/eAgendaViewRule?publd=201404&RIN=1190-AA61
- Legal Brief & Legal Webinar on Website Access Issues: www.ada-audio.org/Archives/ADALegal/index.php?app=2&type=transcript&id=2014-09-22

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Continuing Legal Education Credit for Illinois Attorneys

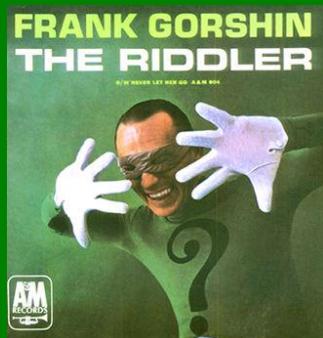


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Questions?



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