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A collaborative program between the  
**Southwest ADA Center, Great Lakes ADA Center and members of the  
ADA National Network**

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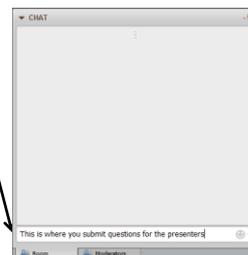
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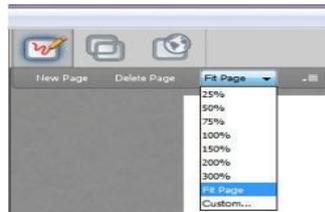
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## Top ADA Cases of 2016

Presented by Equip for Equality

Barry C. Taylor, VP for Civil Rights and Systemic Litigation  
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January 18, 2017



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## Outline of Today's Webinar

- Definition of Disability
- Title I (Employment)
- Questions
  
- Title II (State/Local Governments)
- Title III (Places of Public Accommodation)
- Questions

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## Definition of Disability



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## Reassessing “Substantially Limits” under the ADAAA

### *Cannon v. Jacobs Field Services*

813 F.3d 586 (5th Cir. 2016)

- Employee with torn rotator cuff
  - ❖ Cannot raise right arm above shoulder; limited ability to push/pull
- Received conditional job offer and had pre-employment exam
- Doctor cleared employee with restrictions (no lifting/pulling over 10 lbs, no working with hands above shoulder level)
- Job offer was revoked
- **Dist. ct.:** Found for ER (granted summary judgment) – not disabled
  - ❖ Limitations did not substantially limit daily functioning
- **5th Cir:** Found for EE (reversed/remanded)
  - ❖ Decision “at odds” with ADAAA

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## Reassessing “Substantially Limits” under the ADAAA

### **Court discussed important ADAAA principles**

- Substantially limits no longer demands extensive analysis
- Must compare employee with general population
- Here, undisputed evidence that employee’s shoulder impairment is substantially limiting
  - ❖ Employee and doctor said he cannot lift his right arm above shoulder level
  - ❖ Employee and doctor said he has considerable difficulty lifting, pushing, or pulling objects with right arm
- Also evidence that employee was *regarded as* disabled
  - ❖ Report from employee’s physical demonstrates that his shoulder injury was perceived to be an impairment

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## “Regarded As” Under the ADAAA

### *Alexander v. Wash. Metro. Area Transit Authority*

826 F.3d 544 (D.C. Cir. 2016)

- Employee with alcoholism
- Under the influence of alcohol at work; suspended; referred to EAP
- Returned subject to periodic alcohol tests but failed and was fired
- Told he could reapply in one year if he completed an intensive alcohol dependency treatment program
- Employee completed program but was not rehired
- Alleges it was because he failed EAP, violated alcohol policy
- **Dist. ct.:** Found for ER (granted summary judgment)
  - ❖ Alcoholism did not substantially limit 1+ major life activity
- **D.C. Cir.:** Found for EE (reversed and remanded)

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## Definition of Disability: Three Prongs

- Important language about the *regarded as* prong under the ADAAA
  - ❖ The “regarded-as-prong has become the primary avenue for bringing the type of discrimination claim that Alexander asserts.”
  - ❖ It is now unnecessary in most cases to proceed under the “actual disability” or “record of” prong
  - ❖ Here, only needs to show that ER took a prohibited action against EE because of an actual or perceived *impairment*
  - ❖ No dispute that alcoholism is an impairment – meets standard
- Court also concluded that the EE met the definition of disability under “actual disability” and “record of”
  - ❖ Alcoholism substantially limited sleep, daily care activities, caring for himself, walking, concentrating and communicating

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## Is Obesity a Disability?

### *Morriss v. BNSF Railway Co.*

817 F.3d 1104 (8th Cir. 2016)

- Plaintiff given a conditional job offer for machinist position
- BNSF = Applicants for safety sensitive jobs must have BMI under 40
- Plaintiff's BMI was 40.9 at 5'10" and 270lbs (no medical condition)
- Plaintiff's job offer was revoked
- **Question on appeal:** Is obesity a disability under the ADA?
- **8th Cir.:** Obesity must be due to underlying physiological disorder
  - ❖ ADA statute = Does not define "physical impairment"
  - ❖ EEOC regs = Defines impairment
    - "any physiological disorder or condition . . . affecting one or more body systems"

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## Obesity as a Disability

- **But see** EEOC interpretive guidance: "impairment" does not include physical characteristics such as . . . weight . . . that are within "normal" range and are not the result of a physiological disorder."
  - ❖ **8th Cir.:** Interprets this to require physiological disorder
- **But see** EEOC Compliance Manual: "severe obesity" or "body weight more than 100% over the norm" is a disability
  - ❖ **8th Cir.:** Manual contradicts plain language of Act and regs
- BNSF cited pre-ADAAA cases finding obesity not to be a disability
  - ❖ **8th Cir.:** Pre-ADAAA case law relevant for this holding
    - The EEOC revised regulatory definitions of "substantially limit" and "major life activity" but no changes to "impairment"
- Regarded as? No based on the same reasoning (no impairment)

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## Circuit Split?

### Obesity without a physiological condition is not an impairment

- ***EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006)** (“consistent with the EEOC’s own definition, . . . to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of a physiological condition.”)
- ***Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997)**

### Can be impairment (outside “normal” range or “morbid obesity”)

- ***EEOC v. Res. For Human Dev., Inc.*, 827 F.Supp.2d 688 (E.D. La. 2011)** (a physiological cause for obesity is required only when an individual’s weight is within normal range)
- ***Whittaker v. Am.’s Car-Mart, Inc.*, 2014 WL 1648816 (E.D. Mo. Apr. 24, 2014)** (emphasizing ADAAA)

**Oct. 3, 2016:** Supreme Court denied request for review in *Morriss*

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## Title I (Employment)



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## “Employee” Under the ADA and Section 504

### *Flynn v. Distinctive Home Care, Inc.*

812 F.3d 422 (5th Cir. 2016)

- Plaintiff is an independent contractor, not employee
- ADA Title I = Protects rights of “employees”
- 504 = “disabled persons in federally assisted programs or activities”
  - ✦ Incorporates certain Title I protections
- **Dist. ct.:** Found for ER - contractors cannot sue under Sec. 504
- **5th Cir.:** Reversed: Contractors can sue under Section 504
  - ✦ Rehab Act is broad - covers all programs and activities
  - ✦ Rehab Act does not incorporate Title I’s def. of employer
    - Adopts the *substantive standards* for determining *what* conduct violates the law, not who is covered

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## Circuit Split

### Independent contractors can sue under Section 504

- ***Schrader v. Fred A. Ray, M.D., P.C.*, 296 F.3d 968 (10th Cir. 2002)** (holding that Section 504 does not incorporate the ADA’s requirement that the employer have “fifteen or more employees”)
- ***Fleming v. Yuma Reg’l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009)** (“[T]he Rehabilitation Act covers discrimination claims by an independent contractor.”)
  - ✦ Supreme Court denied cert. **561 U.S. 1006 (2010)**

### Independent contractors cannot sue under Section 504

- ***Wojewski v. Rapid City Reg’l Hosp.*, 450 F.3d 338 (8th Cir. 2006)** (“[W]e affirm ... summary judgment to the defendants because [plaintiff] was not an employee of the hospital.”)

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## Reassignment as a Reasonable Accommodation

**Legal question:** Does reassignment require employers to place an employee in a vacant position OR permit employees to compete?

**Majority Rule:** Reassignment to a vacant position w/o competition is reasonable absent undue hardship or seniority system

- 7th Cir.: *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012)
- 10th Cir. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999)
- D.C. Cir: *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998)

**Minority Rule:** Employers can make reassignment competitive

- 8th Cir.: *Huber v. Wal-Mart*, 486 F.3d 480 (8th Cir. 2007)
  - ❖ **Note:** Adopted reasoning in a now-reversed (pre-*United Airlines*) case “wholesale” and “without analysis”
  - ❖ Supreme Court agreed to review *Huber*, but dismissed the case before ruling after the parties settled

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## Update on Reassignment as a Reasonable Accommodation

### *EEOC v. St. Joseph’s Hospital, Inc.* 842 F.3d 1333 (11th Cir. 2016)

- Plaintiff worked as a nurse in a psychiatric ward
- Developed spinal stenosis, arthritis and started using a cane
- Hospital said cane could be used as a weapon – gave her 30 days to try to find alternate position but she had to compete for new job
- **EEOC:** ER violated ADA b/c required competition for vacant position
- **Hosp./Dist. Ct.:** ADA doesn’t mandate reassignment w/o competition
- **11th Cir:** Found for ER: ADA does not require reassignment w/o competition – “preferential treatment”
  - ❖ Relied on ADA statutory language: reasonable accommodation *may* include reassignment to vacant position
  - ❖ Cited 8<sup>th</sup> Circuit’s decision in *Huber v. Wal-Mart*

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## 11<sup>th</sup> Circuit Decision re: Reassignment as a Reasonable Accommodation

- Cited Supreme Court case, *Barnett v. U.S. Airways*
  - ❖ Held that it is not reasonable to violate a best-qualified hiring policy or a transfer policy “in the run of cases”
  - ❖ Noted this was especially true in hospitals – need best personnel
- However:
  - ❖ Court emphasizes that there could be cases where reassignment would supersede a best-qualified hiring policy, if there are special circumstances that warrant it
  - ❖ Court affirmed jury’s pro-employee holdings (not relevant to ultimate legal conclusion re reassignment)
    - Disability, qualified for vacant positions, not accommodated

**QUERY: Impact of this decision?**

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## Update on 2015 Case Reassignment & Undue Hardship

### *Reyazuddin v. Montgomery County, Maryland*

789 F.3d 407 (4th Cir. 2015)

- Plaintiff who is blind worked as an information and referral aide
- County opened a consolidated call center with inaccessible software
- Plaintiff was not transferred to new center
- Instead, she kept same salary, grade and benefits but supervisors struggled to find work for her
- **4th Cir.:** Q of fact whether county accommodated Plaintiff
  - ❖ County cobbled together “make-work” tasks w/ same salary
  - ❖ An employer may provide an alternate accommodation, but accommodation must be “meaningful employment opportunity”
- Case remanded for trial

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## 2016 Update

- Two-week trial; five-days of jury deliberations
- **2/26/2016:** Jury found for Plaintiff
  - ❖ Country discriminated by refusing to transfer Plaintiff to a call center because of the inaccessible software
  - ❖ County could have provided a reasonable accommodation to make the call center software accessible
  - ❖ Not an undue hardship to make the software accessible
- **Status:**
  - ❖ Court to decide injunctive relief and attorneys' fees
  - ❖ County asked to dismiss stating that as of 10/27/16, Plaintiff has been transferred with accommodations and with full-time meaningful work

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## Qualified: Overreliance on Job Descriptions

### *Camp v. Bi-Lo, LLC*

2016 WL 6134855 (6th Cir. Oct. 21, 2016)

- Individual with a back impairment worked as a stock clerk for 38 yrs
- Job description required “lifting” 20-60 pounds frequently
- Plaintiff’s doctor restricted him from lifting over 35 pounds
- Informal arrangement where co-workers lifted very heavy items
- **Dist. ct.:** Found for ER (granted MSJ) due to job description
- **6th Cir.:** Lifting over 35 pounds was not an essential function (reversed and remanded)
  - ❖ Three-man team had been able to shelve product
  - ❖ Plaintiff fulfilled duties of the job for years with these co-workers
  - ❖ Testimony from immediate supervisor and colleagues

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## Reasonable Accommodation: Full-time ASL Interpreter

### *Searls v. Johns Hopkins Hospital*

158 F.Supp.3d 427 (D. Md. 2016)

- Recent nursing graduate is deaf
  - ❖ Had two clinical rotations at JHH with ASL interpreters
- Voices for herself and reads lip, but understands better with ASL
- Applied for nursing position at JHH that required “highly effective verbal communication and interpersonal skills”
- Given offer contingent on health screening
- Requested full-time ASL interpreter and offer was rescinded
- Undue hardship? Nurse made \$40k-\$60k; interpreter cost \$120k
- Nurse found other job and works successfully with interpreter
- **Court:** Found for EE (granted summary judgment to nurse)

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## Reasonable Accommodation: Full-time ASL Interpreter

- **Court:** Interpreter request was reasonable
  - ❖ Current/prior use of terp; ADA lists terp as accommodation
  - ❖ Current experience and clinical experience at JHH
- **Court:** Interpreter did not reallocate essential functions
  - ❖ EE could still communicate with patients, family and personnel and monitoring alarms – terp could not act independently
  - ❖ Note: Nurse would retain “substantial portion” of duties?
- **Court:** No undue hardship
  - ❖ Examine overall budget—not nurse’s salary or dept. resources
  - ❖ Terp might be 2x nurse’s salary but 0.007% of overall budget
- **Court:** No direct threat due to auditory alarms
  - ❖ Post-hoc rationalization w/o an individualized assessment

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## Issue/Cases to Watch: Wellness Plans

### Background on Issue

- Employer wellness plans often require medical exams and inquiries
- Some plans are tied to health insurance; others are not
- Some employers provide “incentives” for participation
  - ❖ Including greatly reduced healthcare costs
- **Issue:** ADA restricts certain medical exams and inquiries
  - ❖ Two exceptions: Safe harbor provision & “voluntary” disclosure
- EEOC has recently litigated cases about wellness programs

**2016:** EEOC released final rules about wellness programs addressing both exceptions

- **Regs:** [www.gpo.gov/fdsys/pkg/FR-2016-05-17/pdf/2016-11558.pdf](http://www.gpo.gov/fdsys/pkg/FR-2016-05-17/pdf/2016-11558.pdf)
- **Q&A:** [www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm](http://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm)

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## Issue/Cases to Watch: Wellness Plans

### *AARP v. EEOC*, 16-cv-02113 (D.C. 2016)

- **10/24/2016:** AARP filed lawsuit, seek injunction against EEOC regs
  - ❖ Argues that the EEOC’s regs conflict with ADA/GINA--employers can impose heavy financial penalties on employees who decline to share medical/genetic information (ex: charge up to 30%)
- **12/29/2016:** Court denied AARP’s request for preliminary injunction
  - ❖ Failed to demonstrate irreparable harm & likelihood of success
  - ❖ Final decision after review of admin record and add’l briefing

### *EEOC v. Flambeau*, 131 F.Supp.3d 849 (W.D. Wis. Dec. 31, 2015)

- **Issue:** Whether wellness plans fall within ADA safe harbor provision if part of employer’s health insurance plan (dist. ct. found it was)
- Seventh Circuit decision expected in 2017

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## Wellness Plans Safe Harbor Provision & Voluntary Nature

### *EEOC v. Orion Energy Systems, Inc.*

2016 WL 5107019 (E.D. Wis. Sept. 19, 2016)

- Employees who opted out of wellness plan had to pay entire monthly health insurance premium (\$413.43 - \$1,130.83 per month)
- Employer argued: Safe Harbor & Voluntary
- **Court:** Agreed partially with employer and partially with EEOC
  - ❖ Safe Harbor did not apply – this is a very limited exception
    - Found new EEOC reg re safe harbor to be retroactive (Safe harbor provisions not applicable to wellness programs)
    - Even w/o relying on new reg, plans generally unrelated to basic underwriting, risk classification
  - ❖ However, participation in wellness plan was “voluntary”
    - Not mandatory – just a “strong incentive”
    - No claim that reg re: 30% cap was retroactive

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## Title II (State and Local Governments)



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## Applying *Olmstead* to Education DOJ Complaint

### *United States v. Georgia*

16-cv-03088 (N.D. Ga. 2016)

- At issue = Georgia's Network for Educational and Therapeutic Support Program (GNETS Program)
- State administers mental health and therapeutic educational services and supports almost exclusively through GNETS
  - ❖ Segregated programs in self-contained buildings, separate wings
  - ❖ Inferior education: some only receive computer-based instruction
  - ❖ Lack access to electives, facilities and extracurricular activities
  - ❖ Inferior facilities in various states of disrepair
- **July 5, 2016:** DOJ issued letter of findings—program violates ADA
  - ❖ [www.ada.gov/olmstead/documents/gnets\\_lof.pdf](http://www.ada.gov/olmstead/documents/gnets_lof.pdf)

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## Applying *Olmstead* to Education

- **August 23, 2016:** DOJ filed lawsuit alleging the State:
  - ❖ Fails to serve students in the most integrated setting appropriate to their needs
  - ❖ Places other students at risk of segregation
  - ❖ Provides unequal educational opportunities
  - ❖ Fails to modify policies, practices procedures to avoid discrimination
- **Status:** State filed motion to dismiss arguing that DOJ lacks standing to sue – currently pending
  - ❖ Amicus filed by many orgs, including AAPD, Leadership Conf. on Civil Rights, NFB, NAMI, Autistic Self-Advocacy Network
  - ❖ [www.ada.gov/olmstead/documents/gnets\\_complaint.html](http://www.ada.gov/olmstead/documents/gnets_complaint.html)

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## Emergency Preparedness in the School Setting

*Jagielski-Bazzell, et al. v. Los Angeles Unified School District et al*  
15-cv-2921 (C.D. Cal. filed April 20, 2015)

- Complaint against the Marlton School = School for Deaf and Hard of Hearing students
- Emergency information announced over a standard PA system so deaf and hard of hearing teachers and staff:
  - ❖ Had no accessible information during some lockdowns/drills
  - ❖ Were left unaware of some emergencies
- **Sept. 2016: Settlement Agreement (select terms)**
  - ❖ New visual PA system w/ large HD screens, scrolling LCD display, and video phones added to classrooms and common areas to communicate emergency messages and are capable of two-way communication with the front office

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## Emergency Preparedness in the School Setting

- Flashing alarm system to differentiate between evacuations and shelter-in-place situations
- Flashing doorbells on classroom doors along with peepholes or windows in the doors
- ASL interpreter in the command center during emergencies
- Video in ASL describing emergency procedures at the school
- Meeting with first responders re: new procedures and equipment
- Two-way video camera at the entrance gate to the school allowing Deaf staff to communicate from gate
- Monetary relief of \$30,000 per plaintiff - total of \$150,000

[www.equipforequality.org/news-item/settlement-agreement-addresses-emergency-preparedness-people-disabilities-school-setting/](http://www.equipforequality.org/news-item/settlement-agreement-addresses-emergency-preparedness-people-disabilities-school-setting/)

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## Accessibility of Absentee Voting

### *Nat'l Fed'n of Blind v. Lamone*

813 F.3d 494 (4th Cir. 2016)

- MD voters can obtain absentee ballot by mail, fax or download
- If download, voters must print ballot, mark choices, sign and return
- As a result, voters with disabilities need assistance
  - ❖ MD developed an online ballot tool to mark choices electronically
- Plaintiffs file lawsuit = MD absentee voting program violates ADA
  - ❖ While pending, Board of Elections voted to use accessible electronic tool but lacked supermajority required by state law
- 2014: Three-day bench trial
  - ❖ Judge found for plaintiffs - granted preliminary injunction
- **4th Cir.:** Affirmed decision for Plaintiffs

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## Accessibility of Absentee Voting

- Need “meaningful access” to *absentee* voting – not just voting
  - Important conclusion as polling places had accessible equipment
    - ❖ Noted “sharp disparity” between experience of voters with and w/o disabilities regarding private and independent voting
    - ❖ Voting is a “quintessential public activity” that helps ensure that people with disabilities “are never relegated to a position of political powerlessness”
  - Online ballot program = reasonable modification
    - ❖ No fundamental alteration
    - ❖ Rejected argument regarding state law “supermajority”
- See also Hindel v. Husted, 2016 WL 2735935 (S.D. Ohio May 11, 2016) (concluding plaintiffs are denied meaningful access to Ohio's absentee voting system, but finding proposed tool would be a fundamental alteration as it lacks certification – encouraged parties to work on issue to implement software before future elections)*

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## Law Enforcement Modification of Policies

### *Estate of Saylor v. Regal Cinemas, Inc.*

2016 WL 4721254 (D. Md. Sept. 9, 2016)

- Ethan Saylor was a 26-year-old man with Down Syndrome
- After seeing movie, he entered the theater again w/o paying
- Three off-duty county sheriffs were working as security guards
- Aide explained Saylor's disability
  - ❖ Explained if touched, may become angry
  - ❖ Said Saylor's mother was on her way and would either pay for another ticket or get him to leave the theater
- Officers disregarded aide's request
  - ❖ Approached Saylor, told him he needed to leave the theater
  - ❖ Saylor refused. Officers grabbed his arms, dragged him from the theater while yelling that he would go to jail

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### *Estate of Saylor v. Regal Cinemas, Inc.*

- Officers handcuffed Saylor, with one on top of him, fracturing his larynx, and making it difficult to breathe
- Saylor died from asphyxiation
- **Claims in lawsuit:**
  - ❖ Section 1983: Excessive force and various state law claims (wrongful death, gross negligence, battery)
  - ❖ ADA: Failure to train & failure to modify policies
- **2014:** Court denied Defendant's Motion to Dismiss
  - ❖ Recognized both claims under the ADA
  - ❖ Rejected Defendant's argument that Title II could not put them on notice of all possible accommodations for all disabilities
- **2016:** Split decision on ADA, allowing case to move forward

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## *Estate of Saylor v. Regal Cinemas, Inc.*

### **Failure to accommodate (found for estate – denied MSJ)**

- Title II requires public entities to make reasonable accommodations
  - ❖ Following advice of aide of clearly disabled individual and simply waiting would have been “the most logical accommodation”
- Credited expert testimony re: model policy about encounters with individuals with developmental disabilities suggesting:
  - ❖ Avoid taking custody as it will initiate a severe anxiety response and escalate the situation
  - ❖ For minor offenses, explain the situation, suggest alternative means such as release of person to authorized caregiver
- Rejected State’s arguments that:
  - ❖ They were told Saylor could become violent
  - ❖ Officers had no discretion b/c manager said to remove him

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## *Estate of Saylor v. Regal Cinemas, Inc.*

### **Failure to train (found for State – granted MSJ)**

- Must show that the failure to train amounted to “deliberate indifference” which is a stringent standard requiring State to disregard a known risk
- Here, State was not aware of a need for such training
  - ❖ No pattern of similar violations
  - ❖ Never received a request to generate a policy for encounters with individuals with developmental disabilities

#### **Status:**

- Appeal pending on issues unrelated to the ADA
- Settlement conference scheduled for 2017

**New DOJ guidance document: [www.ada.gov/cjta.html](http://www.ada.gov/cjta.html)**

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## Policing: Effective Communication DOJ Settlement Agreements

### City of Columbia, South Carolina Police Department

- Complainant said he was not provided with an ASL interpreter for police questioning over a 3-month period, including at his arrest
- Comprehensive settlement agreement – good template for law enforcement agencies evaluating their own practices

[www.ada.gov/columbia\\_pd/columbia\\_pd\\_sa.html](http://www.ada.gov/columbia_pd/columbia_pd_sa.html) (May 3, 2016)

#### Highlights:

- Designate at least one employee as the ADA coordinator
- Revise policies and training requirements
- Provide auxiliary aids & services / qualified sign language interpreters
- Modify handcuffing policy by handcuffing an individual in front of his body to enable sign language or writing

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## DOJ Settlement

- At least 1 working TTYs and videophones at each station
- Signage to inform the community about TTY/VP availability
- Relationships with 1+ qualified oral/sign language interpreter agencies to ensure interpreter availability on a priority basis 24/7
- Details about requirements in light of exigent circumstances
  - ❖ OK to use what is available consistent with an appropriate law enforcement response during immediate threat
    - Written notes or non-qualified terp
- Non-exigent circumstances
  - ❖ Pictogram (Exhibit A)
  - ❖ Communication assessment (Exhibit C)



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## Title III (Places of Public Accommodation)



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## What is a Place of Public Accommodation – Vending Machine?

### *Magee v. Coca-Cola Refreshments USA*

833 F.3d 530 (5th Cir. 2016)

- Plaintiff, who is blind, filed lawsuit against Coca-Cola because its vending machines are not accessible (no tactile or oral indicators)
- Machines at hospital and bus station – suit only against Coca-Cola
- **MTD:** Machine not place of public accommodation (PPA)
- **Dist. ct.:** Found for Coca-Cola (granted motion to dismiss)
- **5th Cir:** Affirmed - Vending machine is not a PPA
  - ❖ ADA definition of PPA = Must fall in 1 of 12 categories
  - ❖ (E)—a bakery, grocery store, clothing store, hardware store, shopping center, or *other sales or rental establishment.*
  - ❖ Plaintiff argues: Machine is a “sales establishment”

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## What is a Place of Public Accommodation

- Analyzes language in ADA
  - ❖ Sales establishment follows list of retailers occupying physical stores - vending machine is not akin to any listed examples
  - ❖ Instead, vending machines are found *inside* listed entities
- Looks to ADA legislative history and DOJ guidance:
  - ❖ Must construe liberally, but gives examples of other stores
- “Vending machines may very well be subject to various requirements under the ADA by virtue of their being located in a hospital or a bus station, both of which are indisputably places of public accommodation.”
- However, Coca-Cola does not own, lease (or lease to), or operate a place of public accommodation
- **11/21/16:** Petition for Supreme Court review

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## What is a Place of Public Accommodation – Plasma Donation Center?

### *Levorsen v. Octapharma Plasma, Inc.*

828 F.3d 1227 (10th Cir. 2016)

- Octapharma is a plasma-donation center
  - ❖ Collects donors’ plasma by drawing and processing blood, separating and reserving plasma, and returning blood to donor
  - ❖ Pays donors and sells plasma to pharmaceutical companies
- Plaintiff with borderline schizophrenia was barred from donation
- **Dist. ct.:** Plasma donation center is not a PPA
- **10th Cir:** Found for plaintiff (reversed and remanded)
  - ❖ (F)-laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service...other *service establishment*.
  - ❖ Center is place of public accommodation – service establishment

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## What is a Place of Public Accommodation

- Reviews ADA's language and defines "service" & "establishment"
  - ❖ Together – a "service" "establishment" is a place of business or public or private institution that, by its conduct or performance, assists or benefits someone or something or provides useful labor without producing a tangible good for a customer or client
  - ❖ Ordinary meaning yields broad definition consistent with Title III
- Rejects Octapharma argument that service establishments must receive some form of payment *from* customers
  - ❖ Nothing in the language to suggest this limitation
- Legislative history – dropped word "similar" service establishment
- Here, Octapharma meets definition: Assist/benefit those who wish to provide plasma & does not produce tangible good for individuals
- Dissenting opinion

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## Assistive Technology Audio Descriptions

### Settlement Agreement (April 2016)

*American Council of the Blind, Bay State Council of the Blind, Robert Baran and Netflix*

- Agreement re: Audio Descriptions
  - ❖ "Netflix Original" content = Netflix will provide audio description
    - Unless Netflix does not control rights → then will make commercially reasonable efforts to secure and offer AD
  - ❖ Third-party streaming content
    - New content = Netflix will request audio description assets in all new contracts with streaming content providers
    - Existing content = Netflix will make reasonable efforts to obtain existing audio description assets

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## Assistive Technology Audio Descriptions

- Agreement re: Audio Descriptions (continued)
  - ❖ DVDs = Netflix will make “commercially reasonable efforts” to offer discs with audio description
  - ❖ Provide capability to search and browse content for audio descriptions
- Agreement re: Website and Mobile Application
  - ❖ WCAG 2.0 AA accessibility standard for its website
  - ❖ BBC Standard for accessibility of its mobile application

**Learn more:** [www.acb.org/adp/netflix.html](http://www.acb.org/adp/netflix.html)

**Settlement agreement:** [http://dralegal.org/wp-content/uploads/2016/04/Settlement\\_Agreement\\_FOR\\_WEBSITEv2.docx](http://dralegal.org/wp-content/uploads/2016/04/Settlement_Agreement_FOR_WEBSITEv2.docx)

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## Accessible Information Technology

### *Dudley, U.S.A. v. Univ. of Miami*

[www.ada.gov/miami\\_university\\_cd.html](http://www.ada.gov/miami_university_cd.html)

- Broad and detailed consent decree reached ensuring that technology is accessible to students who are blind
- Addresses issues ranging from web content to textbooks and course material to IT procurement policy

*NAD v. Harvard University*, 15-cv-30023 (D. Mass.)

*NAD v. Mass. Inst. of Tech.*, 15-cv-30024 (D. Mass.)

- Universities must have captioning for online materials provided free to the public, incl. recordings of speeches and educational materials
- **Universities:** Title III doesn't apply to the accessibility of online content & captioning is a fundamental alteration of content
- **Ct:** Denied MTD [www.ada.gov/briefs/harvard\\_soi.pdf](http://www.ada.gov/briefs/harvard_soi.pdf); [www.ada.gov/briefs/mit\\_soi.pdf](http://www.ada.gov/briefs/mit_soi.pdf)

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## Mental Health on College Campuses

### *DOJ Agreement with Princeton University*

- Review prompted by private lawsuit
  - ❖ *W.P. v. Princeton University, et al.*, 3:14-cv-01893 (D. N.J., filed Mar. 26, 2014)
  - ❖ W.P. ingested 20 pills (antidepressants)
  - ❖ Checked himself into the hospital
  - ❖ After 3 days, barred from dorm and classes
  - ❖ [www.newyorker.com/news/news-desk/suicidal-students-allowed-campus](http://www.newyorker.com/news/news-desk/suicidal-students-allowed-campus)
- United States conducted a compliance review
  - ❖ Reviewed policies/practices re: reasonable accommodation, withdrawal, and leave for students with mental health disabilities
- Agreement resolved compliance review; lawsuit still pending

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## Mental Health on College Campuses

- Revise policies to explicitly describe possible accommodations
    - ❖ Include changes to university policies, rules and regulations
    - ❖ Specify requests can be for academics, housing/dining; etc
    - ❖ Note where students submit requests / how Princeton will review
  - Revise websites for Office of Disability Services and Office of the Dean of Undergraduate Students to better direct info to students
  - Revise leave policy and practices to be consistent w/ Title III regs
  - Provide annual training on Title III, including references to updated policies, with a focus on mental health disability discrimination
    - ❖ Training for all faculty and staff with responsibilities for evaluating/deciding reasonable accommodation requests
- [www.ada.gov/princeton\\_sa.html](http://www.ada.gov/princeton_sa.html) (12/19/2016)

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## Children with Diabetes & YMCAs

### DOJ Settlement Agreements

- **2016 Trend:** Childcare providers entered into settlement agreements to provide assistance to children with Type 1 Diabetes
- Needs differ, but children need assistance with blood glucose monitoring, administration of insulin and emergency medication
  - ❖ **Arlington-Mansfield YMCA (TX)**
    - [www.ada.gov/arlington\\_ymca.html](http://www.ada.gov/arlington_ymca.html) (2/24/2016)
  - ❖ **Philadelphia Freedom Valley YMCA (PA)**
    - [www.ada.gov/rocky\\_run\\_sa.html](http://www.ada.gov/rocky_run_sa.html) (5/19/2016)
  - ❖ **YMCA of the Triangle (NC)**
    - [www.ada.gov/ymca\\_triangle\\_sa.html](http://www.ada.gov/ymca_triangle_sa.html) (7/27/16)
  - ❖ **YMCA of Metro Chicago (IL)**
    - [www.justice.gov/usao-ndil/pr/united-states-announces-settlement-ymca-metro-chicago-ensure-compliance-americans](http://www.justice.gov/usao-ndil/pr/united-states-announces-settlement-ymca-metro-chicago-ensure-compliance-americans) (12/21/16)

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## Children with Diabetes & YMCAs Terms of Settlement Agreements

### Settlement agreements generally include:

- Nondiscrimination provisions
- Requirement to modify policies, including the adoption of Diabetes Medical Management Plan (DMMP)
- Some specify that the DMMP should be in the style of the National Diabetes Education Program's sample plan
  - ❖ Includes instruction on monitoring blood glucose levels, administration of insulin and emergency medication (Glucagon)
- Procedures for fielding and responding to requests for modification
- Adoption of an ADA compliance officer
- Title III nondiscrimination training
- Oversight by DOJ
- Arlington agreement includes \$10,000 payment to complainants

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## Ride Sharing Litigation Case/Issue Update

### *Nat'l Fed. of the Blind of California v. Uber*

103 F.Supp.3d 1073 (N.D. Cal. 2015)

- Plaintiffs allege that Uber refuses to transport guide dogs
  - ◊ Examples: Driver shouted “no dogs” and left; driver refused to accept passenger with service animal
- **2015:** Court denied motion to dismiss – Plaintiffs’ claim can proceed
- **4/30/2016:** Parties announced they had reached a settlement
  - **7/13/16:** Court granted preliminary approval
  - **12/6/16:** Court granted final approval and attorneys’ fees

<http://dralegal.org/case/national-federation-of-the-blind-of-california-et-al-v-uber-technologies-inc-et-al/>

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## Ride Sharing Litigation Case/Issue Update

### **Select Settlement Terms**

- Drivers will expressly confirm that they understand their legal obligations to transport rides with service animals
- Revised enforcement policies:
  - ◊ Remove drivers after a single complaint if Uber finds the driver knowingly denied a person a ride due to a service animal
  - ◊ Remove drivers after two complaints, regardless of intent
- Enhance response system for complaints and to track data
- NFB and Cal. affiliate will deploy testers to evaluate compliance

**Case to Watch:** *Access Living of Metropolitan Chicago, et al v. Uber Technologies, et al*, 16-cv-09690 (N.D. Illinois) (10/13/16)

- ◊ Re: failure to provide equivalent service, including WAVs

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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](mailto:barryt@equipforequality.org)
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA at 877-232-1990 (V/TTY) or [webinars@ada-audio.org](mailto:webinars@ada-audio.org)

(877) 232 – 1990 (V/TTY)  
<http://www.ada-audio.org>

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the session with a link to the  
on-line evaluation



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## Top ADA Cases of 2016

**Presented by:**

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**January 18, 2017**

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## Next ADA Legal Webinar Session

**Topic to be announced**

**March 22, 2017**

**[www.ada-legal.org](http://www.ada-legal.org)**



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