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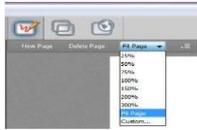
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Top ADA Cases of 2017

Presented by Equip for Equality
Barry C. Taylor, VP for Civil Rights and Systemic Litigation
Rachel M. Weisberg, Staff Attorney / Employment Rights Helpline Manager

February 14, 2018



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Outline of Today's Webinar



- ### Top Cases and Settlements of 2017
- Definition of Disability
 - Title I
 - Title II
 - Title III
 - Questions





Definition of Disability



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Gender Dysphoria



Blatt v. Cabela's Retail, Inc. 2017 WL 2178123 (E.D. Pa. May 18, 2017)

- Plaintiff who identified as female alleged harassment and termination based on sex and disability
- Sued under ADA based on diagnosis of Gender Dysphoria
- **Employer:** ADA excludes Gender Identity Disorder, 42 USC §12211
- **Court:** Found for employee (denied motion to dismiss)
 - ◊ Exclusion should be narrow to comport with ADA's broad def.
 - ◊ Doesn't exclude disabling conditions that persons who identify with a different gender may have, such as gender dysphoria - characterized by clinically significant stress, other impairments
 - ◊ Here, substantial limitations in major life activities (interacting with others, reproducing, social and occupational functioning)



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Pregnancy-Related Impairments



EEOC Settlement with Allsup's Convenience Stores 15-cv-863 (D.N.M. Settlement Reached 9/25/2017)

- Brought on behalf of 28 pregnant women, many with pregnancy-related impairments
- Employees were denied reasonable accommodations (ex: modifying stocking methods of pregnant employees with lifting restrictions); denied leave extensions; and/or forced to take unpaid leave
- **Consent decree:**
 - ◊ \$950,000; re-employment offers and letters of reference
 - ◊ Implement policies, practices and training
- **EEOC:** "We see too many cases where employers think that pregnancy-related disabilities are not covered by the ADA."
www.eeoc.gov/eeoc/newsroom/release/9-25-17d.cfm



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Title I



Inflexible Leave Policies



EEOC v. United Postal Service

09-cv-5291 (N.D. Ill. Agreement Reached 8/8/2017)

- **UPS Policy:** Employees with disabilities *automatically* fired when they reached 12 months of leave --- "inflexible leave policy"
- **EEOC:** Violation of ADA – failure to engage in interactive process.
- **Settlement reached:**
 - \$2 million to nearly 90 current and former UPS employees
 - Update policies and improve implementation; training

www1.eeoc.gov/eeoc/newsroom/release/8-8-17.cfm

See also EEOC v. River Region Medical Center, 13-cv-00189 (S.D. Miss. 9/13/2017) (settling case for \$100,000 and injunctive relief where nurse was terminated after she requested a 2-week leave extension)
www1.eeoc.gov/eeoc/newsroom/release/9-13-17.cfm



Leave as a Reasonable Accommodation



Severson v. Heartland Woodcraft, Inc.

872 F.3d 476 (7th Cir. 2017)

- After 12-week FMLA leave for serious back pain, employee requested leave extension under ADA (2-3 months)
- Request denied, but invited to re-apply after cleared to work
- **7th Circuit:** Found for employer (affirmed summary judgment)
 - "An employee who needs long-term medical leave *cannot* work and thus is not a 'qualified individual' under the ADA."
 - Intermittent / short leave—a couple of days or even a couple of weeks—may, be a reasonable accommodation
 - But a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job

Impact of case?



Job Coach as a Reasonable Accommodation



EEOC v. Papa John's Pizza

14-cv-00695 (D. Utah)

- Individual with Down syndrome worked successfully for over five months with an independently employed job coach
- Operating partner visited location, observed individual working with job coach, and directed that he be fired
- **EEOC consent decree (1/25/2017)**
 - ◊ \$125,000 to employee
 - ◊ Review EEO policies
 - ◊ Conduct training for management/HR employees in Utah
 - ◊ Establish recruitment program for individuals w/ disabilities

www.eeoc.gov/eeoc/newsroom/release/1-26-17.cfm

Triggering Interactive Process



Dorsey v. CHS

2017 WL 1356093 (D. Colo. April 13, 2017)

- Salesman underwent deep brain stimulation surgery to ease symptoms of Parkinson's disease – developed dysarthria
- Sales numbers were fine
- Fired after clients complained he was difficult to understand
- Brought lawsuit re: unlawful termination and failure to accommodate
- **Employer:** No obligation because employee made no request
- **Court:** Found for employee (denied motion for summary judgment)
 - ◊ Distinguish situations where it is "hard for an employer to know" whether an employee's difficulties are disability-related or not
 - ◊ Here, salesman's "obvious manifestation" of his disability put company on notice, triggered interactive process

Medical Examinations & Confidentiality



DOJ Agreement with New Albany, Indiana

17-cv-185 (S.D. Ind. Agreement reached Oct 4, 2017)

- Chief of police requested medical information from officer on leave
- Based on medical information, Chief filed charges against the officer to the Merit Commission providing medical information
- Public meeting – Commission voted to permit officer to work but:
 - ◊ Chief/City's attorney referenced disability, concerns re: fitness
 - ◊ Commission attorney gave press charging documents that had info re: prescription meds, treatment, and psychological evals
- **Settlement Agreement:** \$100,000
 - ◊ Revise policies, practices and procedures re: confidentiality
 - ◊ Training about confidentiality requirements

www.ada.gov/new_albany/new_albany_sa.html

Medical Marijuana & ADA

- ADA **excludes** "any employee or applicant who is currently engag[ed] in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114 (a)
- Earlier cases – no ADA claim
 - ◊ *Johnson v. Columbia Falls Aluminum Co., LLC*, 213 P.3d 789 (Mont. 2009) (ADA does not require employers to accommodate employees who use medical marijuana)
 - ◊ *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010)
 - ◊ *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586 (Wash. 2011)

Medical Marijuana & State Law Protections



Barbuto v. Advantage Sales and Marketing, 477 Mass. 456 (July 17, 2017)

- Plaintiff with Crohn's disease used medical marijuana legally, but denied employment after failing drug test
- **Supreme Court of Mass.:** Found for EE (reversed MTD)
 - ◊ Plaintiff has viable claim under state anti-discrimination law
 - ◊ Permitting off-site use of medical marijuana may be an accommodation (not *per se* unreasonable due to federal law)
 - ◊ May be reasons not reasonable (safety, statutory obligation, etc.)
 - ◊ No claim under state medical marijuana law

See also *Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017) (finding ADA does not preempt state medical marijuana law's anti-discrimination employment provision)

Disability Harassment



Cooper v. CLP Corporation (d/b/a McDonald's) 679 F. App'x 851 (11th Cir. 2017)

- Manager joked about employee's disability, referred to daily as a "cockeyed ass" or "lazy-eyed"
- Employee did not complain about the conduct per CLP's policy
- **11th Circuit:** Found for CLP (affirmed grant of summary judgment)
 - ◊ Employers can avoid liability if (1) they exercise reasonable care to prevent/correct promptly any harassing behavior and (2) the employee unreasonably failed to take advantage of the preventative and corrective measures. *Faragher/Elterth defense*
 - ◊ CLP had an anti-harassment policy that required employees to immediately report to manager OR human resources
 - ◊ Plaintiff knew about it but did not report the harassment



Title II

ADA in Public Schools



Fry v. Napoleon Community Schools

137 S. Ct. 743 (2017)

- **Facts:** E.F., a student with cerebral palsy, requested permission to bring her service animal, Wonder, to school – school denied request
- **OCR:** Violation of Title II of the ADA and Rehab Act
 - ◊ School agreed to allow E.F. to bring Wonder to school
 - ◊ E.F. started different school, filed ADA/504 lawsuit for damages
- **Dist. Ct.:** Dismissed case – failed to exhaust remedies under IDEA
 - ◊ **Reminder:** Case not brought under IDEA
 - ◊ 20 U.S.C. § 1415(l): Must use IDEA's administrative procedures when "seeking relief that is also available under [the IDEA]."
- **Sixth Circuit:** Affirmed decision
- **Sup. Ct.:** Found for student (reversed and remanded) – unanimous

ADA in Public Schools



Court: Exhaustion is required when the "gravamen of the complaint" seeks relief for free and appropriate education (FAPE)

- Does not matter whether complaint expressly states FAPE/IEP
- Must consider primary purpose of the laws:
 - ◊ ADA/504: Disability discrimination that applies both inside and outside of the schools for people of all ages
 - ◊ IDEA: Meaningful access to education w/ individualized services
- **Tips for courts**
 - ◊ Consider procedural history of process. If used IDEA administrative process → FAPE
 - ◊ Consider whether the same complaint could be brought outside of the school context or by adults? If no → FAPE

Impact of case?

Voting Access



DOJ Agreement with Chicago Board of Election

www.ada.gov/chicago_boe_sa.html (April 2017)

- **Chicago:** 1,452 polling places, 2,069 precincts, 50 early voting sites
- **Pre-Settlement**
 - ◊ Spring 2016: DOJ surveyed 100+ sites – found many barriers
 - ◊ CBOE: Retained Equip for Equality (IL P&A) to inspect 1,000 sites on election date in Nov 2016 – found more barriers
- **Settlement Agreement**
 - ◊ **100%** of polling places will be accessible by Nov. 2020 election
 - ◊ CBOE retained EFE to survey other polling sites
 - ◊ EFE reviewed *all* surveys and recommend either (1) temporary or permanent alterations; (2) relocating polling place
 - ◊ *New* polling places = accessible (or able to be made accessible)

CBOE Settlement Highlights



- Cannot use **curbside voting** in lieu of accessible polling places
 - ◊ "It is the Department's position that the exemption and curbside voting provisions [of Illinois law] are inconsistent with the ADA."
 - ◊ CBOE must "select polling places that are or can be made accessible so that individuals with disabilities can vote on the same terms and with the same level of privacy afforded to others." **28 C.F.R. § 35.130(a)**
- Includes examples of **temporary solutions**
 - ◊ Ex: propping open doors, relocating furniture, portable ramps
- CBOE will **train** precinct coordinators on how installing/maintaining equipment and accessibility items

See more DOJ agreements from 2017: www.ada.gov/fauquier_county_sa.html,
www.ada.gov/luzerne_sa.html, www.ada.gov/richland_county_sa.html,

Absentee Voting – Right to Vote Privately and Independently



Hindel v. Husted

875 F.3d 344 (6th Cir. 2017)

- To vote absentee, blind voters must rely on sighted person
- Plaintiffs proposed online marking tool used by other states
- Ohio argues fundamental alteration: Implementing new system would violate state law re: Ohio's certification requirements
- **District court:** Found for Ohio (judgment on the pleadings)
 - ◊ Plaintiffs denied meaningful access to vote privately and independently; but proposed tool was a fundamental alteration
- **6th Cir:** Found for plaintiffs (reversed and remanded)
 - ◊ Ohio has the burden to prove fundamental alteration
 - ◊ Ohio must show the proposed tool is unreasonable or incompatible with Ohio's election system

Accessible 911



Enos v. State of Arizona

2017 WL 553039 (D. Az. Feb. 10, 2017)

- NAD and three individuals sued State and various local governments that play a role in providing 911 services
- Current 911 services are inaccessible – plaintiffs call 911 with:
 - ◊ TTYs → virtually obsolete
 - ◊ Relay → requires high-speed Internet connection
- Remedy requested: Ability to text for 911 services
- **Court:** Allowed case to proceed (denied motion to dismiss)
 - ◊ Plaintiffs stated a claim under the ADA
 - ◊ Plaintiffs cannot use the 911 system outside their homes or areas with high-speed Internet access

Curb Ramp Settlements



Reynoldson et al v. City of Seattle

15-cv-01608 (W.D. Wash. Consent Decree, Approved Nov. 1, 2017)

- Three plaintiffs alleged City failed to install and maintain curb ramps
- **Settlement:** City will install and/or remediate 20,000+ accessible curb ramps over 18 years (“annual commitment” of 1,250 per year)
 - ◊ Includes prioritization for installation/remediation
 - ◊ DOT will have a qualified ADA coordinator
 - ◊ Curb ramp request system

See also Ochoa et al v. City of Long Beach, 14-cv-04307 (C.D. Cal. Settlement Agreement, Approved April 9, 2017) (City will construct curb ramps where missing within 5 years; fix existing curb ramps that are damaged within 20 years; and fix pedestrian barriers)

Criminal Justice: Law Enforcement



Joseph v. Bailum

2017 WL 733393 (S.D. Fla. Feb. 24, 2017)

- Plaintiff’s sister called 911 during plaintiff’s grand mal seizure
- With little English and heavy accent, said brother was “sick” and when asked if he was “drunk” or used “drugs,” she said “no”
- Deputies—not ambulance—arrived. Sister said “epileptic” and “sick”
- Plaintiff did not respond to verbal commands, placed under arrest
- During arrest, plaintiff “involuntarily bit” officer due to seizure – tased
- **Court:** Found for plaintiff (denied motion to dismiss ADA claim)
 - ◊ Wrongful arrest due to disability
 - ◊ Misunderstanding of physical symptoms led to his arrest
 - ◊ Rejected Defendant’s argument that there was no ADA case because plaintiff was arrested for unlawful conduct of biting

Sovereign Immunity



Reininger v. Oklahoma

2017 WL 5196621(W.D. Okla. Nov. 9, 2017)

- Website live streams Oklahoma legislative hearings, proceedings
- Deaf citizen requested captioning; suit for damages and injunction
- **State defense:** Suit barred by sovereign immunity
- **Court:** Found for citizen (denied State's motion to dismiss)
 - ◊ Congress validly abrogated sovereign immunity
 - ◊ Right to meaningful participation in the political process and access publicly available information needed to participate
 - ◊ Congressional record has history and pattern of unconstitutional discrimination by state governments against deaf citizens
 - ◊ Not overly burdensome, especially with affirmative defenses

Sovereign Immunity



King v. Marion Circuit Court

868 F.3d 589 (7th Cir. 2017)

- County subsidizes private dispute resolution in domestic-relations cases -- "modest means program" -- can be ordered or requested
- Plaintiff requested a referral to program, and for ASL interpreter
- Denied request for ASL interpreter for program, but agreed to provide one if plaintiff continued through court
- Plaintiff declined; relied on his stepfather to interpret
- **7th Cir.:** Found for County (reversed/remanded bench trial decision)
 - ◊ Not valid abrogation of sovereign immunity
 - ◊ Here, unlike Tennessee v. Lane, denial of court-annexed mediation services is not a denial of judicial services
 - ◊ Different result if mediation was mandatory



Title III

Direct Threat / Access to Healthcare



United States and Milano v. Asare

2017 WL 6547900 (S.D.N.Y. Dec. 20, 2017)

- Cosmetic surgeon excluded patients with HIV and/or on meds
- **Court:** Found for plaintiffs (granted motion for summary judgment)
 - Eligibility criteria that screens out PWD and is not necessary
 - Defendant's burden to show exclusion is necessary – can't meet burden because he "automatically reject[s]" patients
 - Even if risk, failed to make reasonable modifications
 - Plaintiff proposed adjusting sedative protocol, hiring anesthesiologist to monitor/assist, etc.
 - Fundamental alteration fails – no individualized inquiry

See also Settlement Agreement: DOJ and Advanced Plastic Surgery Solutions, www.ada.gov/adv_plastic_surgery_sa.html (Dec.11, 2017)

Barrier Removal & Alternatives



Yates v. Sweet Potato Enterprises

684 F. App'x 655 (9th Cir. 2017)

- Lawsuit against Popeyes for inaccessible entrance
- **District ct.:** Held installing power doors was *readily achievable*
 - But refused to order an injunction because Popeyes had "mooted" the problem with employee assistance and a sign
- **9th Cir:** Found for individual (reversed and remanded on this issue)
 - Alternatives to barrier removal are not appropriate when it is "readily achievable" to remove a barrier
 - Court found the store had the capacity and financial ability to install power door (cost was \$5,850)
 - "Having found remediation of the barrier was readily achievable," court was required to issue an injunction → remanded to do so

Communication Access & VRI



Silva v. Baptist Health South Florida

856 F.3d 824 (11th Cir. 2017)

- Plaintiffs alleged that Hospital's persistent use of VRI violated the ADA because of technical difficulties or practical limitations
 - Ex: Machine was inoperable or unusable, picture would be blocked, frozen or degraded, staff don't know how to use it
- **District Court:** Hospital provided effective communication
 - No evidence of misdiagnosis or improper medical treatment
 - Plaintiffs failed to identify what they failed to understand
 - Plaintiffs lacked standing to seek injunctive relief
- **Appeal:** DOJ amicus brief www.justice.gov/crt/file/870846/download
- **11th Cir:** Found for plaintiffs (reversed/remanded MSJ)

Communication Access & VRI



- ADA/Rehab Act claims are not the same as medical malpractice
 - ◊ Focus is on **communication** itself – not the **consequences** of the failed communication
 - ◊ **Question:** Did patient experience a real hindrance, due to her disability, affecting her ability to exchange material medical information with her health care professionals?
- Here, Plaintiffs provided evidence that they were “hindered” due to issues with VRI and lack of in-person interpreters
- Plaintiffs are not required to identify exactly what information they were unable to understand or convey
- Cites DOJ regulations re: VRI (appropriate technology and training)
- Plaintiffs had **standing** because they regularly used the Hospital, lived nearby and were likely to return

Additional Settlements re VRI Usage



Morales v. Saint Barnabas Medical Center

13-cv-06363 (D.N.J. Consent Order, Feb. 14, 2017)

- Must meet **DOJ regulatory requirements** – examples:
 - ◊ High quality video images; sharp and large image
- VRI **shall not be used** when it is **ineffective** – examples:
 - ◊ Inability to see, move head/hands/arm, limited cognition, or pain
 - ◊ Information exchanged is highly complex
 - ◊ Area without a designated high speed Internet line
 - ◊ Space restrictions in room where patient is treated
 - ◊ VRI not operational after staff try for 45 minutes
- If VRI is not effective, must provide onsite interpreter
- If VRI is used, will confirm it is meeting individual’s needs

Moss v. Newark Beth Israel Med. Ctr., 13-cv-4360 (D.N.J. Consent Order, Feb. 16, 2017)
www.equipforequality.org/news-item/health-care-consent-orders

Communication Access in Theaters



McGann v. Cinemark USA, Inc.

873 F.3d 218 (3d Cir. 2017)

- Customer who is deaf-blind denied an ASL tactile interpreter to see the movie – regularly had interpreters at other theater
- **Bench trial:** Judge found for owner
- **3rd Cir:** Found for customer (vacated and remanded)
 - ◊ Falls comfortably within the scope of “auxiliary aids and services”
 - ◊ Rejected argument that tactile interpreters are “special” service not required by law – to find otherwise would effectively eliminate the requirement to provide auxiliary aids and services
 - ◊ Rejected fundamental alteration defense
 - ◊ Remanded to determine undue burden
- **Status:** Cinemark petitioned for rehearing *en banc*

Communication Access in Theaters



Blanks et al v. AMC Entertainment Inc. et al 16-cv-00765 (N.D. Cal. Agreement reached April 27, 2017)

- Audio description – verbal description of visual events on screen
- AMC provided audio description equipment, but was often inaccessible due to equipment and customer service issues
- **Settlement (select terms):** Applies nationwide
 - Managers/staff will be trained on audio description equipment
 - Parties developed information guides for better service
 - Managers will check equipment regularly
 - Equipment will be available before the feature movie begins, so customers can test/troubleshoot before movie begins

<https://rbgg.com/wp-content/uploads/Blanks-v-AMC-Settlement-FINAL-04-27-17-1341-1.pdf>

Website Accessibility



814+ federal suits filed about web access (according to Seyfarth Shaw)
• 13 motions to dismiss were filed; 2 were granted

Robles v. Dominos Pizza LLC 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017)

- Dominos' website and mobile app are inaccessible
- **Court:** Found for Dominos (dismisses case without prejudice)
 - Confirmed that ADA applies to services of a place of public accommodation, not just services *in* such a place
 - But requiring compliance with web accessibility guidelines that are not yet law violates due process – no DOJ regs on point
 - Also suggested 24-hour toll-free phone number with live agents may be sufficient access
- **Status:** Appealed to 9th Circuit

Website Accessibility



Gorecki v. Hobby Lobby 2017 WL 2957736 (C.D. Cal. June 15, 2017)

- Same court, different judge, rejected same due process argument
- Sufficient notice, as DOJ has had position for 20+ years

Gniewkowski v. Lettuce Entertain You 251 F.Supp.3d 908 (W.D. Penn. 2017)

- A website can be a place of public accommodation when it is owned, operated and controlled by a public accommodation

Andrews v. Blick Art Materials 268 F. Supp. 3d 381 (E.D.N.Y. 2017)

- “[C]ruel irony” to adopt [this] interpretation... , render the legislation intended to emancipate the disabled from the bonds of isolation and segregation obsolete when its objective is increasingly within reach.”

Website Accessibility



Gil v. Winn Dixie

257 F.Supp.3d 1340 (S.D. Fla. 2017)

- First trial on website accessibility
- **Court:** Grocer violated Title III by having an inaccessible website
 - ◊ No need to decide if website itself is a public accommodation because site is "heavily integrated" with physical store
- **Injunction:**
 - ◊ Compliance with WCAG 2.0 AA
 - ◊ Website audits every three months
 - ◊ Compliance for third party vendors who participate on website
 - ◊ Annual web accessibility training
 - ◊ \$250,000 cost to remediate site was not an undue burden
- **Status:** Case has been appealed to 11th Circuit

Rideshare Companies & the ADA



Settlement: National Federation of the Blind & Lyft

<http://dralegal.org/case/lyft-access-riders-service-animals/> (2017)

- Complainants asserted that Lyft's policies, practices and procedures failed to ensure that individuals who are blind travelling with service animals received reliable transportation
- **Settlement:** Reached through structured negotiations
 - ◊ New policy: Every Lyft ride who has a service animal must be accommodated, regardless of driver's preference or circumstances
 - ◊ Non-compliance may result in immediate and permanent deactivation from platform
 - ◊ New education—videos, announcements and other outreach

Rideshare Companies & the ADA



Two **new** cases filed about wheelchair accessible vehicles

- **Equal Rights Ctr v. Uber**, 17-cv-01272 (D.D.C. filed June 28, 2017)
 - ◊ Asserts that Uber has designed and operated its service in D.C. in a way that effectively excludes wheelchair users from UberX
 - ◊ Directs users to DC taxicabs – and then imposes a surcharge
 - ◊ None of the 30,000+ vehicles aren't accessible
- **Brooklyn Center for Independence for the Disabled v. Uber Technologies**, 17-cv-6399 (S.D.N.Y. filed July 18, 2017)
 - ◊ 99.9% cabs in NYC aren't accessible

Status: Uber filed motions to dismiss in both cases, which are pending

Also pending: **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 WAV

Questions

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