



The 30th Anniversary of the ADA: A Review of the Most Important ADA Cases

Presented by Equip for Equality

Barry C. Taylor, VP for Civil Rights and Systemic Litigation
Rachel M. Weisberg, Attorney & Employment Rights Helpline Manager

July 15, 2020



1

Continuing Legal Education Credit for Illinois Attorneys



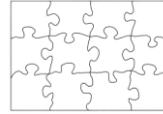
- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact 877-232-1990 (V/TTY) or webinars@ada-audio.org
- This slide will be repeated at the end.



2

2

Outline for Webinar



Let's examine:

- Where have we been?
- Where are we now?
- Where are we going?

Topics:

- **Definition of Disability**
- **Title I**
 - ❖ Telework as an Accommodation
 - ❖ Hiring practices
 - ❖ Direct Threat
- **Title II**
 - ❖ Community Integration
 - ❖ Corrections
 - ❖ Voting
- **Title III**
 - ❖ Healthcare
 - ❖ Websites
 - ❖ Places of Public Accommodation

3

Definition of Disability: Where Have We Been



First Decade of ADA Litigation

- Courts narrowly interpreted the definition of disability

Sutton v. United Airlines

527 U.S. 421 (1999)

- **Facts:** United refused to hire plaintiffs as pilots due to their vision. United argued they were not disabled under the ADA because they did not have substantial limitations when wearing glasses.
- **Issue:** Are mitigating measures considered when assessing disability?
- **Supreme Court: Yes.** Effects of corrective measures must be taken into account when determining if plaintiff has an ADA disability.
- **Note:** Two other cases in 1999, known as the "Sutton trilogy"

4

Where Are We Now: Episodic Conditions



Courts are considering episodic conditions when “active”

Jones v. Honda of America Mfg. **2015 WL 1036382 (S.D. Ohio Mar. 9, 2015)**

- **Facts:** Employee’s back pain was acute enough that she had to miss work 1-2 times a year for 5-6 days, once for 16 days
- **Court:** Could be a substantial limitation given episodic nature
 - ❖ Even when a physical impairment does not substantially limit a major life activity at the time of an adverse employment action, and employee can still show that she has a disability.

See also *Gage v. Rymes Heating Oils, Inc.*, 2016 WL 843262 (D.N.H. Mar. 01, 2016) (chronic migraines were substantially limiting when active as they impacted ability to feel, speak, communicate)

7

Where Are We Now: Mitigating Measures



Courts are disregarding ameliorative effects of mitigating measures

Ceska v. City of Chicago **2015 WL 468767 (N.D. Ill. Feb. 3, 2015)**

- **Facts:** Plaintiff’s neck injury restricted him from lifting 10+ pounds occasionally and rendered him unable to sleep even 3-4 hrs/night
 - ❖ Plaintiff required medication to sleep
- **Court:** Disregarded ameliorative effect of medication and assumed plaintiff could not sleep even 3-4 hours a night

See also *Orne v. Christie*, 2013 WL 85171 (E.D. Va. Jan. 7, 2013) (rejecting argument that employee’s sleep apnea was not disabling because his CPAP machine “cure[d]” or “relieve[d]” the employee).

8

Where Are We Now: Major Bodily Functions



Courts consistently apply the concept of major bodily functions in numerous cases involving a variety of impairments.

- Successful at significantly broadening ADA's coverage
- Arterial conditions substantially limit the cardiovascular system. *Daniels v. Tex. Dep't of Transp.*, 2016 WL 7188836 (E.D. Tex. Dec. 10, 2016)
- Cancer substantially limits [the major life activity of] normal cell growth. *Punt v. Kelly Servs.*, 2016 WL 67654 (D. Colo. Jan. 6, 2016)
- Kidney failure substantially limit the cleansing of the individual's blood and processing of waste. *Arroyo-Ruiz v. Triple-S Mgmt. Grp.*, 206 F. Supp. 3d 701 (D.P.R. 2016)
- Muscular dystrophy substantially limits neurological functioning *Yanoski v. Silgan White Cap Americas, LLC*, 179 F.Supp.3d 413 (M.D. Penn. 2016).

9

Where Are We Now: Major Bodily Functions



- IBS substantially limits bowel functions *Myles v. University of Penn. Health System*, 2011 WL 6150638 (E.D. Pa. Dec. 12, 2011)
- Graves' Disease substantially limits immune, circulatory and endocrine functions *Seim v. Three Eagles Commc'ns, Inc.*, 2011 WL 2149061 (N.D. Iowa June 1, 2011)
- Multiple Sclerosis substantially limits neurological functions *Feldman v. Law Enforce. Assoc. Corp.*, 779 F.Supp.2d 472 (E.D.N.C. 2011)
- Brain tumor substantially limits brain functions and normal cell growth *Meinelt v. P.F. Chang's China Bistro*, 787 F.Supp.2d 643 (S.D. Tex. 2011)
- Coronary disease substantially limits the cardiovascular system *Haferman v. Wi. Dep' of Corr.*, 2016 WL 206484 (W.D. Wis. Jan. 15, 2016)
- Post Traumatic Stress Disorder substantially limits brain function *Franklin v. City of Slidell*, 2013 WL 1288405 (E.D. La. Mar. 27, 2013)

10

Where We Are Now: Regarded As



Alexander v. Wash. Metro. Area Transit Authority 826 F.3d 544 (D.C. Cir. 2016)

- **Facts:** Employee with alcoholism; used alcohol at work; suspended; referred to EAP; returned subject to periodic tests; failed; fired
 - ❖ Told he could reapply in one year if he completed an intensive alcohol dependency treatment program - was not rehired
- **Dist. ct.:** Found for employer (granted summary judgment)
 - ❖ Alcoholism did not substantially limit 1+ major life activity
- **D.C. Cir.:** Found for employee (reversed and remanded)
 - ❖ It is now unnecessary in most cases to proceed under the “actual disability” or “record of” prong; only needs to show that ER took a prohibited action because of an actual or perceived *impairment*
 - ❖ No dispute that alcoholism is an impairment – meets standard

Where Are We Going: Gender Dysphoria



Doe v. Massachusetts Dept. of Corrections 2018 WL 2994403 (D. Mass. June 14, 2018)

- **Facts:** Doe is a transgender woman with Gender Dysphoria (GD).
- **MDOC:** Argued GD is not a disability under the ADA
- **Court:** Found for plaintiff (denied motion to dismiss)
 - ❖ ADA excludes “gender identity disorders not resulting from physical impairments” - GD is not categorically exempt
 - ❖ GD *may* result from physical causes: hormonal, genetic drivers
 - ❖ DSM definition requires attendant disabling physical symptoms

But see Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744 (S.D. Ohio 2018) (GD is not an ADA-disability; plaintiff did not plead that her Gender Dysphoria was caused by a physical impairment or that GD always is caused by a physical impairment)

Where Are We Going: COVID-19 as a Disability

COVID-19
(Novel Coronavirus)
INFORMATION & UPDATES

Is COVID-19 a disability under the ADA?

- Actual disability and “record of”
 - ❖ Is COVID-19 an impairment?
 - ❖ Does it cause a substantial limitation to a major life activity?
 - In severe cases → breathing, communicating, lung functioning?
 - But even in mild cases → interacting with others, communicating, working?
- “Regarded as”
 - ❖ Is COVID-19 an impairment?
 - ❖ Does it fall within the exception for “transitory and minor”?

13

Where Have We Been: Telework as an Accommodation



Vande Zande v. State of Wis. Dep’t of Admin. 44 F.3d 538 (7th Cir. 1995)

- **Facts:** Program assistant performed clerical, secretarial and administrative tasks
 - ❖ She had lower-body paralysis, resulting in pressure ulcers
 - ❖ She asked to telework for an 8-week period; needed a computer
- **7th Cir.:** Affirmed dismissal of case
 - ❖ No real discussion of whether work could be done remotely
 - ❖ “An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. ... [I]t would take a very extraordinary case for the employee to be able to create a triable issue of the employer’s failure to allow the employee to work at home.”

14

Where Are We Now: Telework



EEOC v. Ford Motor Company 782 F.3d 753 (6th Cir. 2015) (en banc)

- **Facts:** Resale-buyer with IBS asked to telework, as needed, up to four times a week
- **6th Cir.:** Found for employer
 - ❖ Job was “interactive” requiring teamwork, meetings and availability to participate in face-to-face interactions
 - ❖ Other buyers regularly/predictably attend work on site and those who telecommute do so one day/week and come in if needed
 - ❖ Employee admitted that absences caused mistakes and that 4/10 of her duties could not be performed at home
 - ❖ Technology in use (email, computers, phone, video conference) existed when courts held on-site attendance essential

Where Are We Now: Telework



But courts find that while physical presence in the workplace is essential for many jobs, it is not for all jobs

Mosby-Meachem v. Memphis Light, Gas & Water Division 883 F.3d 595 (6th Cir. 2018)

- **Facts:** In-house attorney needed to telework for 10 weeks; explained exactly how she could perform each of her tasks remotely
- **Employer denied request:** Physical presence was an essential function; Telework created concerns about confidentiality
- **6th Cir.:** Upheld jury verdict for employee
 - ❖ Evidence that employee worked remotely successfully in past
 - ❖ Short period of time needed; colleague said no problem
 - ❖ Despite evidence for employer (job description; past attorney)

Where Are We Going: Telework



Bilinsky v. American Airlines, Inc. 928 F.3d 565 (7th Cir. 2019)

- **Facts:** Employee with MS worked remotely from Chicago instead of Texas; after company merger, telework no longer permitted
- **7th Cir.:** Found for employer – **but important language**
 - ❖ Technological development and the expansion of telecommuting means this accommodation is not as extraordinary as it was
 - ❖ Inquiry is context-specific – telework might be reasonable for a software engineer but not for a construction worker
 - ❖ Assess reasonableness under current technological capabilities

Prevalence of telework due to COVID is likely to change how employers and courts view telework as an accommodation

Where Have We Been: Hiring Practices



Karraker v. Rent-A-Center 411 F.3d 831 (7th Cir. 2005)

- **Facts:** MMPI was given to people seeking promotions into management positions; Test had questions, including:
 - ❖ I see things, animals or people that others do not see
 - ❖ At times I have fits of laughing and crying that I cannot control
- **EEOC guidance** regarding psychological tests as medical exams:
 - ❖ Psychological tests that are “designed to identify a mental disorder or impairment” = medical exam
 - ❖ Psychological tests “that measure personality traits such as honesty, preferences, and habits” ≠ medical exam
- **Court:** “The MMPI is best categorized as a medical examination”

Where Are We Now: Hiring Practices



Strong employment protections about using qualification standards that screen out people with disabilities; not a large body of case law

Settlement: U.S. and York County, SC www.ada.gov/york_county_sa.html (June 10, 2019)

- **County:** Need driver's license for Purchasing Manager job
- **Complainant:** Did not have a drivers' license; license was not essential for job; asked for a waiver; request was denied
- **DOJ:** Impermissible qualification standard
 - ❖ Screened out applicants with disabilities and unnecessary for job
- **Settlement:** Ensure job listings include only essential functions as mandatory requirements
 - ❖ \$20,000 in compensatory damages
 - ❖ Review policies; provide training; ADA coordinator

Where Are We Going: Hiring Practices



More and more employers are using some form of technology powered by artificial intelligence (AI) to screen applicants

- **Examples:** Computer-based employment assessments; video interviews analyzed by computers for speech and facial expressions
- **Legal questions:**
 - ❖ Are these tests medical exams?
 - ❖ Do these tests screen out people with disabilities? If so, are they job-related and consistent with business necessity?
- **Learn more:**
 - ❖ EARN policy brief:
 - https://askearn.org/wp-content/uploads/2019/06/AI_PolicyBrief-A.pdf
 - ❖ Georgetown Project on Disability Rights & Algorithmic Fairness
 - <https://www.georgetowntech.org/ai-dr>

Where Have We Been: Direct Threat



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

- **Facts:** Person with Hepatitis C was not hired for a job because he was considered a danger to himself
- **Issue:** ADA statute only includes “danger to others” as a defense but ADA regulations from the EEOC includes “danger to self”
- **Supreme Court:** Upheld the EEOC regulations
 - ❖ Direct threat includes danger to self
- **Impact:** There was concern within the disability community that this ruling would result in paternalistic conjecture by employers and undercut personal empowerment for people with disabilities

Where Are We Now: Direct Threat



Generally speaking, it is a high burden for employers to prove direct threat. It is important to consider reasonable accommodations.

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

- **Facts:** State Department rejected applicant with HIV for a Foreign Service position because medical treatment might not be available in certain countries where he might be stationed.
- **Circuit Court:** Found for applicant (reversed summary judgment)
 - ❖ Must consider reasonable accommodations
 - ❖ Here – two possible accommodations
 - Only placing him at certain overseas posts
 - Permitting use of allotted leave to access medical care

Where Are We Now: Direct Threat



Employer policies that categorically exclude certain disabilities are often found to run afoul with direct threat analysis

Littlefield v. Nevada, ex. Rel. Dept. of Public Safety 195 F.Supp.3d 1147 (D. Nev. 2016)

- **Facts:** Plaintiff with monocular vision denied position as highway patrol officer due to policy that excluded people with monocular vision
- **Court:** Employer failed to conduct individualized assessment whether plaintiff could perform the essential functions despite his monocular vision

23

Where Are We Going: Direct Threat



Breaux v. Bollinger Shipyards 2018 WL 3329059 (E.D. La. July 5, 2018)

- **Facts:** Employer policy prohibited employees in safety sensitive jobs from taking certain medications within eight hours of a shift
 - ❖ After a number of years, employer learned that welder was taking Suboxone; employee provided clearance from doctor
 - ❖ Welder given six month leave to wean himself – then fired
- **Court:** Found for plaintiff (denied summary judgment)
 - ❖ While Suboxone can cause sedation, analgesia and other symptoms, no evidence that it caused symptoms for plaintiff
 - ❖ Cleared by treating doc; took meds for years without issue

Employers likely to raise direct threat defense related to employees (or employees' associates) with COVID-19

24

Where Have We Been: Community Integration



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

- **Facts:** Two women wanted to move from a state hospital to community; state didn't change placement
- **Supreme Court:** Unwarranted institutionalization of people with disabilities is a form of discrimination under the ADA
- **Community integration requirements:**
 - ❖ Treatment officials find community is appropriate
 - ❖ Person does not oppose placement in the community
 - ❖ Placement can be reasonably accommodated taking into account State resources & needs of other people with disabilities
- **State can meet its ADA obligations if it has a:**
 - ❖ Comprehensive, effectively working plan for evaluating/placing people with disabilities in less restrictive settings
 - ❖ Waiting list that moves at a reasonable pace

Where Are We Now: Community Integration



Original *Olmstead* decision involved a state-operated institution; courts have applied the integration mandate to other systems

- **Privately owned facilities that receive state funding**
 - ❖ *Disability Advocates Inc. v. Paterson*, 653 F.Supp.2d 184 (E.D.N.Y. 2009) – Adult homes for people with mental illness
 - ❖ *Ligas v. Hamos*, 2006 WL 644474 (N.D. Ill. Mar. 7, 2006) – Private Intermediate Care Facilities for people with DD
 - ❖ *Colbert v. Quinn*, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008) – Traditional nursing homes
- **Budget cuts that place plaintiffs at risk of institutionalization**
 - ❖ *V.L. v. Wagner*, 669 F.Supp.2d 1106 (N.D. Cal. 2009) - State's proposed reduction or termination of in-home support services for budget reasons could violate the ADA's integration mandate

Where Are We Now: Community Integration



- **People at risk of institution**

- ❖ ***Ball v. Kasich*, 244 F.Supp.3d 662 (S.D. Ohio 2017)**

- Integration mandate applies to those who are living in the community who allege current harm and serious risk of institutionalization.

- **Provision of employment-related services**

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

- Applying “integration mandate” to employment services

- ❖ ***U.S. v. Rhode Island*, 14-cv-00175 (D.R.I. 2014)**

- First statewide settlement on behalf of people who are unnecessarily segregated in sheltered workshops and facility-based day programs

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

Where Are We Going: Community Integration



- **Public education**

- ❖ ***U.S. v. Georgia*, 2020 WL 3496783 (N.D. Ga. May 13, 2020); *Georgia Advocacy Off. v. Georgia*, 2020 WL 1650434 (N.D. Ga. Mar. 19, 2020)** – cases can move forward (denied MTD)

- **Facts:** GA systemically segregates its students with disabilities, most of whom are students of color
- Separate schools or inside regular schools but housed in locked wings; facilities in disrepair
- Inferior education: some only receive computer-based instruction; lack of electives, facilities and activities
- **ADA Claims:** GNETS program unnecessarily segregates students with disabilities and provides unequal education

COVID-19 has highlighted issues with institutional living

Where Have We Been: Corrections



Pennsylvania Dep't of Corrections v. Yeskey 524 U.S. 206 (1998)

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

Where Are We Now: Corrections



Pierce v. D.C. 128 F. Supp. 3d 250 (D.D.C. 2015)

- **Facts:** Deaf individual was incarcerated for 51 days
 - ❖ Prison staff never assessed Plaintiff's communication needs
 - ❖ Plaintiff asked for an interpreter for intake, medical and classes
- **Court:** Found for Plaintiff (granted summary judgment)
 - ❖ Prisons have an **affirmative duty** to assess the accommodation needs of inmates with known disabilities taken into custody
 - ❖ Even if the individual has not made a specific request
 - ❖ Needed interpreter – evidenced by differences in ASL/English

McBride v. Michigan Dep't of Corrections, 294 F.Supp.3d 695 (E.D. Mich. 2018) (ordering MDOC to provide video phones; ASL interpreters for all "high-stakes interactions"; training on identifying/interacting)

Where Are We Now: Corrections



Marks v. Colorado Department of Corrections 958 F.3d 1001 (10th Cir. 2020)

- **Facts:** Individual with spinal stenosis admitted to a community corrections program run by a private contractor
 - ❖ After she fell in the shower and exacerbated her disability, contractor returned her to prison – said she cannot work
- **Dist. Ct.:** Found for CDOC because decision made by contractor
- **10th Cir.:** Reversed. Contracting program of community corrections does not prevent liability under the ADA or the Rehabilitation Act

See also Cook v. Ill. Dept. of Corr., 2018 WL 294515 (N.D. Ill. Jan. 4, 2018) (denying summary judgment to plaintiff, who had been ordered to participate in substance abuse program, but only two accessible facilities offered program; not provided services on the “same basis” as others).

Where Are We Going: Corrections



Solitary confinement as an ADA issue

- **Andrews v. Rauner, 2018 WL 3748401 (C.D. Ill. Aug. 6, 2018)**
 - ❖ Woman with mental illness engaged in acts of self-harm; placed in solitary confinement. IDOC said not an ADA case
 - ❖ **Court:** Denied IDOC’s motion to dismiss – plaintiff denied activities (education, programming, recreation, exercise, mental health treatment) due to disability and segregation-status

Treating opioid-use disorder in correctional facilities

- **Pesce v. Coppinger, 355 F.Supp.3d 35 (D. Mass. 2018)**
 - ❖ **Court:** Policy refusing to permit methadone-use for individual with opioid use disorder likely violated the ADA

Cases regarding COVID-19 in prisons and jails

Where Have We Been: Voting



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 and Rehabilitation Act protections include meaningful access to private and independent voting
 - ❖ One of the “central features” and “benefits” of voting is “voting privately and independently”
 - ❖ Voters should be given equal opportunity
 - ❖ Relying on 3rd parties creates an inferior voting experience
 - ❖ To be effective, auxiliary aids and services must be provided in a way to protect an individual’s “privacy and independence”

Where Are We Now: Voting



Cases and settlements re: physical access for polls and accessible electronic voting machines to ensure private, independent voting

DOJ Agreement with Harris County, TX www.ada.gov/harris_co_sa.html (March 2019)

- Remediate identified violations (permanent or temporary solutions) for Election Day or relocate voting sites
- Develop survey instrument to assess accessibility with photos
 - ❖ Survey all new sites and sites not previously surveyed and submit results to expert – identify remedial measures
- Election Day Compliance Review of temporary measures to be implemented at each polling location for each election judge
- Training for election judges
- Limits and rules for curbside voting

Where Are We Going: Voting



National Federation of Blind v. Lamone

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

- **Facts:** MD voters with disabilities would not mark absentee ballot privately and independently
- **4th Cir.:** Affirmed trial decision for Plaintiffs
 - ❖ Need “meaningful access” to *absentee* voting – not just voting
 - ❖ Important conclusion as polling places had accessible equipment
 - ❖ 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

See also *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017) (Ohio)



35

35

Where Are We Going: Voting



A number of recent significant cases and settlements on this issue -- examples:

- ***Drenth v. Boockvar*, 2020 WL 2745729 (M.D. Pa. May 27, 2020)**
 - ❖ Granted TRO to ensure accessible vote-by-mail in Pennsylvania
- ***National Fed. of the Blind v. County of Alameda*, www.lflegal.com/2018/11/alameda-voting/**
 - ❖ Voters can request ballots via accessible, electronic forms
 - ❖ County will acquire a remote accessible vote-by-mail system that will allow blind voters to review and mark vote-by-mail ballots electronically, privately and independently

While there already has been progress on this issue, we expect to see even more advocacy about the accessibility of absentee ballots, especially due to the push for vote-by-mail



36

36

Where Have We Been: Healthcare



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

- **Facts:** A dentist refused to treat a patient with HIV in his office
 - ❖ Alleged patient posed a direct threat to the dentist's safety
- **Supreme Court:**
 - ❖ In determining direct threat, healthcare providers must make an individualized inquiry as to the circumstances of the particular plaintiff, and rely only on most recent objective medical evidence, "without deferring to individual subjective judgments"
 - ❖ **Note:** First ADA case decided by U.S. Supreme Court

37

Where Are We Now: Healthcare



United States v. Asare

2018 WL 2465378 (S.D.N.Y. June 1, 2018)

- **Facts:** Cosmetic surgeon refused patients with HIV and/or on meds
- **Court:** Found for plaintiffs (granted motion for summary judgment)
 - ❖ Eligibility criteria unnecessarily screens out people with disabilities 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

38

Where Are We Now: Healthcare



Crane v. Lifemark Hospitals 898 F.3d 1130 (11th Cir. 2018)

- **Facts:** Patient is deaf and has chronic depressive and anxiety disorders – evaluated to see if he posed a direct threat to himself or others; no interpreter provided for evaluation
- **District court:** Found for hospital
 - ❖ Medical records showed that the hospital met its duty to conduct an evaluation – thus, effective communication
- **11th Cir.:** Found for patient (reversed/remanded summary judgment)
 - ❖ Focus is not whether medical personnel made correct decision
 - ❖ Focus is on patient's equal opportunity to communicate medically relevant information
 - ❖ Here, jury could find patient could not communicate info

39

Where Are We Going: Healthcare



- **Accessibility of Telemedicine**
- **Healthcare rationing**
 - ❖ Tennessee crisis standards of care disqualified individuals with certain disabilities from use of a ventilator in times of scarcity
 - ❖ **Resolution of HHS/OCR complaint:**
www.hhs.gov/about/news/2020/06/26/ocr-resolves-complaint-tennessee-after-it-revises-its-triage-plans-protect-against-disability.html
- **No visitor policies**
 - ❖ Alleged that policies restricting access to support persons deny patients with disabilities access to medical treatment, effective communication, ability to make informed decisions / consent
 - ❖ **Resolution of HHS/OCR complaint:**
www.hhs.gov/about/news/2020/06/09/ocr-resolves-complaints-after-state-connecticut-private-hospital-safeguard-rights-persons.html

40

Where Have We Been: Website Access



Courts consider: Are websites covered by Title III of the ADA?

- **Statute:** No mention of websites or the 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)

Where Have We Been: Website Access



Nat'l Ass'n of the Deaf, et al, v. Netflix, Inc. 869 F. Supp. 2d 196 (D. Mass. 2012)

- **Facts:** “Watch Instantly” streamed content; no closed captioning
- **Netflix:** No physical space, so not place of public accommodation
- **Court:** Denied Netflix’s motion to dismiss
 - ❖ Places of public accommodation are not limited to actual physical structures
 - ❖ Netflix falls within at least one, if not more, of the enumerated ADA categories: service establishment; place of exhibition or entertainment; rental establishment

But see Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (dismissing case because Netflix had no nexus to “an actual physical space” as required by Ninth Circuit precedent)

Where Have We Been: Website Access



- **2010:** Published Advanced Notice of Proposed Rulemaking on Website Accessibility
- **2014/2015:** Announced plans to publish Notice of Proposed Rulemaking
- **2014-2017:** Various delays
- **2017:** Placed Rulemaking in Inactive Status
- **Dec 2017:** Withdrew Advanced Notice of Proposed Rulemaking
- **Result:** There will not be any regulations about website accessibility in the near future

www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced

Where Are We Now: Website Access



Robles v. Dominos Pizza LLC 913 F.3d 898 (9th Cir. 2019)

- **Facts:** Plaintiff challenged inaccessible website and mobile app
- **Dominos:** Many arguments, including due process
- **District court:** Dismissed case for due process concerns
- **9th Cir:** Found for plaintiff (Reversed/remanded)
 - **ADA applies to Domino's website and mobile app**
 - ADA applies to services *of* a place of public accommodation not just services *in* a public accommodation + nexus
 - **No due process violation**
 - ADA isn't impermissibly vague; DOJ has been clear since '96
 - WCAG 2.0 is a possible remedy; not basis for noncompliance
 - Lack of regulations doesn't eliminate a statutory requirement
- **Supreme Court:** Declined to review decision (denied cert)

Where Are We Going: Website Access



How do we measure accessibility?

- Most likely WCAG 2.1, AA
 - ❖ **Recent settlements:**
 - **NFB v. County of Alameda**
www.lflegal.com/2018/11/alameda-voting/
 - **ACB v. Hulu LLC**, 17-cv-12285 (D. Mass. Oct. 17, 2018),
<https://dralegal.org/case/acb-et-al-v-hulu-llc/>

Who is responsible for third-party content?

- Most likely place of public accommodation
 - ❖ **Gil v. Winn Dixie**, 257 F.Supp.3d 1340 (S.D. Fla. 2017)
 - **Bench Trial:** Issued injunction to comply with WCAG 2.0, AA, audits every three months; annual web training; compliance for third party vendors (appealed)

Where Have We Been: “Public Accommodation”



PGA Tour, Inc. v. Martin 532 U.S. 661 (2001)

- **Facts:** Casey Martin – a professional golfer with a degenerative circulatory disorder – sued the PGA for prohibiting golf carts
- **PGA argues:** Martin *provides* entertainment – doesn’t consume
- **Issue:** Whether the PGA is a place of public accommodation
- **Court:** PGA and golf competition is a public accommodation
 - ❖ The phrase “public accommodation” should be construed broadly and has a “comprehensive definition”
 - ❖ Rejected argument that Martin is a provider – not a consumer – of entertainment for the public (PGA offers two privileges)
 - ❖ Events occur on “golf courses”; specifically identified as a public accommodation; PGA “leases” and “operates” golf courses

Where Are We Now: “Public Accommodation”



- **Coca-cola machines**
 - ❖ No; coca-cola machines are not places of public accommodation
 - *Magee v. Coca-Cola*, 833 F.3d 530 (5th Cir. 2016)
- **Plasma donation cases**
 - ❖ Yes; plasma donation centers are places of public accommodation
 - *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171 (3d Cir. 2019)
 - *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016)
 - ❖ No; plasma donation centers are not places of public accommodation
 - *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018)

Where Are We Going: “Public Accommodation”



Law is still developing: Websites, plasma donation centers, sharing economy, including rideshare companies

Access Living v. Uber Technologies 351 F.Supp.3d 1141 (N.D. Ill. 2018)

- **Court:** Found for plaintiffs (denied MTD/judgment on pleadings)
 - ❖ Confirmed a “place of public accommodation” does not need to be a physical space - Uber may be a public accommodation
 - ❖ Broadly interpreted obligation to provide “equivalent services”

Settlements:

- NFB (service animals): <http://dralegal.org/case/national-federation-of-the-blind-of-california-et-al-v-uber-technologies-inc-et-al/> (2016)
- NFB (service animals): <http://dralegal.org/case/lyft-access-riders-service-animals/> (2017)
- DOJ (collapsible wheelchairs): www.ada.gov/lyft_sa.html (2020)

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
- 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

49

Questions?



50

Session Evaluation

Your feedback is important to us

You will receive an email following the session with a link to the on-line evaluation



51

51

Next ADA Legal Webinar Series Session:

Mark your Calendar

September 16, 2020

Criminal Justice and the ADA

Registration is available:
www.ada-legal.org



52

52