The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues

Cynthia Brougher
Legislative Attorney

James V. DeBergh
Legislative Attorney

March 22, 2012

Congressional Research Service
7-5700
www.crs.gov
98-921

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Americans with Disabilities Act (ADA) provides broad nondiscrimination protection in employment, public services, public accommodations, services operated by public entities, transportation, and telecommunications for individuals with disabilities. This report summarizes the major provisions of the ADA and analyzes selected recent issues, including the Supreme Court cases and the ADA Amendments Act of 2008.

Contents

Contacts

Background

The Americans with Disabilities Act, ADA, 42 U.S.C. §§12101 *et seq*., has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. It provides broad nondiscrimination protection in employment, public services, public accommodations, and services operated by private entities, transportation, and telecommunications for individuals with disabilities.[1] As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Enacted on July 26, 1990, the majority of the ADA's provisions took effect in 1992.[2] The ADA Amendments Act, P.L. 110-325, was enacted on September 25, 2008, to respond to a series of Supreme Court decisions that had interpreted the definition of disability narrowly.[3]

The Supreme Court has decided 20 ADA cases.[4] In the most recent Supreme Court decision, *United States v. Georgia,*[5] the Court held that Title II of the ADA created a private cause of action for damages against the states for conduct that actually violated the Fourteenth Amendment. However, the Court did not reach the issue of whether the Eleventh Amendment permits a prisoner to secure money damages from a state for state actions that violate the ADA but not the Constitution. In addition, the Supreme Court decided *Arbaugh v. Y. & H Corp.*,[6] a case under Title VII of the Civil Rights Act of 1964, which has implications for the ADA's prohibition of discrimination where employers employ 15 or more employees.

On December 7, 2007, the Supreme Court granted certiorari in *Huber v. Wal-Mart Stores,*[7] to determine whether an individual with a disability who cannot perform her current job must be reassigned to a vacant, equivalent position without competing with other workers. However, the Court dismissed the petition since the case was settled prior to oral argument. Currently, there is a

[1] The ADA and Section 504 of the Rehabilitation Act of 1973, however, have not been found to cover medical treatment decisions. See e.g. *Burger v. Bloomberg*, 418 F.3d 882 (8th Cir. 2005); *McElroy v. Patient Selection Committee of the Nebraska Medical Center*, 2007 U.S. Dist. LEXIS 86321 (D. Nebraska November 21, 2007)(an individual with mental illness was denied a kidney transplant on medical grounds).

[2] 42 U.S.C. §12102(b)(1).

[3] For a more detailed discussion of P.L. 110-325, see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Emily C. Barbour and James V. DeBergh.

[4] The ADA cases decided by the Supreme Court are: *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Pennsylvania Department of Prisons v. Yeskey*, 524 U.S. 206 (1998); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998); *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999); *Olmstead v. L.C.*, 527 U.S. 581 (1999); *Murphy v. United Parcel Service, Inc*., 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc*., 527 U.S. 471(1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Garrett v. University of Alabama*, 531 U.S. 356 (2001); *PGA Tour v. Martin*, 532 U.S. 661 (2001); *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Human Resources*, 532 U.S. 598 (2001); *U.S. Airways Inc. v. Barnett*, 535 U.S. 391 (2002); *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002); *Chevron USA Inc. v. Echazabal*, 536 U.S. 73 (2002); *Barnes v. Gorman*, 536 U.S. 181 (2002); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S 440 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119 (2005); and *United States v. Georgia*, 546 U.S. 151 (2006). For a discussion limited to Supreme Court decisions on the ADA, see CRS Report RL31401, *The Americans with Disabilities Act: Supreme Court Decisions*, by Nancy Lee Jones.

[5] 546 U.S. 151 (2006).

[6] *Arbaugh v. Y.& H. Corp.*, 546 U.S. 500 (2006).

[7] 486 F.3d 480 (8th Cir. 2007), *cert. granted*, 552 U.S. 1074 (2007); *cert. dismissed*, 552 U.S. 1136 (2008).

split in the circuits on this accommodation issue, and in light of the Court's dismissal of the case, there will continue to be divergent views.[8]

Before examining the provisions of the ADA and these cases, it is important to briefly note the ADA's historical antecedents. A federal statutory provision which existed prior to the ADA, Section 504 of the Rehabilitation Act of 1973, prohibits discrimination against an otherwise qualified individual with a disability, solely on the basis of the disability, in any program or activity that receives federal financial assistance, the executive agencies or the U.S. Postal Service.[9] Many of the concepts used in the ADA originated in Section 504 and its interpretations; however, there is one major difference. While Section 504's prohibition against discrimination is tied to the receipt of federal financial assistance, the ADA also covers entities not receiving such funds. In addition, the federal executive agencies and the U.S. Postal Service are covered under Section 504, not the ADA. The ADA contains a specific provision stating that except as otherwise provided in the act, nothing in the act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act (which includes Section 504) or the regulations issued by federal agencies pursuant to such Title.[10]

The ADA is a civil rights statute; it does not provide grant funds to help entities comply with its requirements. It does include a section on technical assistance which authorizes grants and awards for the purpose of technical assistance such as the dissemination of information about rights under the ADA and techniques for effective compliance.[11] However, there are tax code provisions which may assist certain businesses or individuals.[12]

Definition of Disability

Statutory Language

Definition Language

The definitions in the ADA, particularly the definition of "disability," are the starting point for an analysis of rights provided by the law.[13] The term "disability," with respect to an individual, is

[8] See e.g., *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999), holding that a vacant position automatically goes to a qualified individual with a disability; *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), holding that an employer does not have to "turn away a superior applicant."

[9] 29 U.S.C. §794. For a more detailed discussion of Section 504, see CRS Report RL34041, *Section 504 of the Rehabilitation Act of 1973: Prohibiting Discrimination Against Individuals with Disabilities in Programs or Activities Receiving Federal Assistance*, by Emily C. Barbour.

[10] 42 U.S.C. §12201(a).

[11] 42 U.S.C. §12206.

[12] See CRS Report RS21006, *Business Tax Provisions That Benefit Persons with Disabilities*, by Pamela J. Jackson, and CRS Report RS20555, *Additional Standard Tax Deduction for the Blind: A Description and Assessment*, by Pamela J. Jackson and Jennifer Teefy. See also GAO Report GAO-03-39, "Business Tax Incentives: Incentives to Employ Workers with Disabilities Receive Limited Use and Have an Uncertain Impact" (December 2002).

[13] The issue of whether the ADA definition of disability would cover individuals who are discriminated against due to a genetic condition is of less importance since the enactment of the Genetic Information Nondiscrimination Act of 2008 (GINA), P.L. 110-233. For a discussion of this act, see CRS Report RL34584, *The Genetic Information Nondiscrimination Act of 2008 (GINA)*, by Amanda K. Sarata and James V. DeBergh, and CRS Report R40116, *The* (continued...)

defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))."[14] The definition of disability was the subject of numerous cases brought under the ADA including major Supreme Court decisions which generally interpreted the definition narrowly. Due to these interpretations, Congress enacted the ADA Amendments Act, which kept essentially the same statutory language but contains new rules of construction regarding the definition of disability. These rules of construction provide that

- the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the act;
- the term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act;
- an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability;
- an impairment that is episodic or in remission is a disability if it would have substantially limited a major life activity when active;
- the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, except that the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered.[15]

The final EEOC regulations track the statutory definition but also provide some clarifying interpretations. For example, the operation of major bodily functions is included in the definition of major life activities. In addition, although the EEOC emphasizes the ADAAA's requirement for an individualized assessment, the regulations list some impairments that will almost always be determined to be a disability. These include deafness, blindness, an intellectual disability, missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[16]

Statement of Findings and Purposes Regarding the Definition

The findings of the ADA Amendments Act include statements indicating that the Supreme Court decisions in *Sutton v. United Air Lines, Inc*.,[17] and *Toyota Motor Manufacturing v. Williams*[18] as

(...continued)

Genetic Information Nondiscrimination Act of 2008: Selected Issues, by Amanda K. Sarata.

[14] 42 U.S.C. §12102(3) as amended by P.L. 110-325, §4(a). For a more detailed discussion of these amendments, see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Emily C. Barbour and James V. DeBergh.

[15] Low vision devices are not included in the ordinary eyeglasses and contact lens exception.

[16] New 29 C.F.R. §1630.2(j)(3)(iii); 76 *Federal Register* 17001 (March 25, 2011). For an analysis of the final regulations, CRS Report R41757, *The ADA Amendments Act Definition of Disability: Final EEOC Regulations* , by James V. DeBergh.

[17] 527 U.S. 471 (1999).

[18] 534 U.S. 184 (2004).

well as lower court cases have narrowed and limited the ADA from what was intended by Congress. The codified findings in the original ADA are amended to delete the finding that "43,000,000 Americans have one or more physical or mental disabilities...." This finding was used in *Sutton* to support limiting the reach of the definition of disability. P.L. 110-325 specifically states that the current EEOC regulations defining the term "substantially limits" as "significantly restricted" are "inconsistent with congressional intent, by expressing too high a standard." The EEOC has promulgated regulations under the ADA Amendments Act which change the definition of "substantially limits."[19]

The ADA Amendments Act states that the purposes of the legislation are to carry out the ADA's objectives of the elimination of discrimination and the provision of "'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection available under the ADA." P.L. 110-325 rejected the Supreme Court's holdings that mitigating measures are to be used in making a determination of whether an impairment substantially limits a major life activity as well as holdings defining the "substantially limits" requirements. The substantially limits requirements of *Toyota* as well as the former EEOC regulations defining substantially limits as "significantly restricted" are specifically rejected in the new law.

Major Life Activities

The ADA Amendments Act specifically lists examples of major life activities including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The act also states that a major life activity includes the operation of a major bodily function. The House Judiciary Committee report indicates that "this clarification was needed to ensure that the impact of an impairment on the operation of major bodily functions is not overlooked or wrongly dismissed as falling outside the definition of 'major life activities' under the ADA."[20] There had been judicial decisions which found that certain bodily functions had not been covered by the definition of disability. For example, in *Furnish v. SVI Sys., Inc.,*[21] the Seventh Circuit held that an individual with cirrhosis of the liver due to infection with Hepatitis B was not an individual with a disability because liver function was not "integral to one's daily existence."

Regarded as Having a Disability

The third prong of the definition of disability covers individuals who are "regarded as having such an impairment (as described in paragraph (3))." Paragraph 3 states that "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." However, impairments that are transitory and minor are specifically excluded from the regarded prong. A transitory impairment is one with an actual or expected duration of six months or less. The ADA Amendments Act also provides in a rule of

[19] 76 *Federal Register* 16978 (March 25, 2011). For an analysis of the final regulations, CRS Report R41757, *The ADA Amendments Act Definition of Disability: Final EEOC Regulations* , by James V. DeBergh.

[20] H.Rept. 110-730, Part 2, at 16 (2008).

[21] 270 F.3d 445 (7th Cir. 2001).

construction in Title V of the ADA that a covered entity under Title I,[22] a public entity under Title II, or a person who operates a place of public accommodation under Title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability solely under the "regarded as" prong of the definition.

Regulatory Authority to Promulgate Regulations Regarding the Definition of Disability

The Supreme Court in *Sutton* questioned the authority of regulatory agencies to promulgate regulations for the definition of disability in the ADA. The definition of disability is contained in Section 3 of the ADA, and the ADA does not specifically give any agency the authority to interpret the definitions in Section 3, including the definition of disability. The Supreme Court declined to address this issue since, as both parties to *Sutton* accepted the regulation as valid, "we have no occasion to consider what deference they are due, if any." The ADA Amendments Act specifically grants regulatory authority and states that "[t]he authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act, includes the authority to issue regulations implementing the definitions contained in sections 3 and 4."

Title V Provisions on the Definition of Disability

The definition of "disability" was further elaborated in Title V of the ADA. Section 510 provides that the term "individual with a disability" in the ADA does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.[23] An individual who has been rehabilitated would be covered. However, the conference report language clarifies that the provision does not permit individuals to invoke coverage simply by showing they are participating in a drug rehabilitation program; they must refrain from using drugs.[24] The conference report also indicates that the limitation in coverage is not intended to be narrowly construed to only persons who use drugs "on the day of, or within a matter of weeks before, the action in question."[25] The definitional section of the Rehabilitation Act was also amended to create uniformity with this definition.

Section 508 provides that an individual shall not be considered to have a disability solely because that individual is a transvestite.[26] Section 511 similarly provides that homosexuality and bisexuality are not disabilities under the act and that the term disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling,

[22] Title I of the ADA covers employment, Title II covers states and localities, and Title III covers places of public accommodations such as grocery stores, doctors' offices, and movie theaters.

[23] 42 U.S.C. §12210.

[24] H.Rept. 101-596, 101st Cong., 2d Sess. 64; 1990 U.S. Code Cong. & Ad. News 573.

[25] *Id.*

[26] 42 U.S.C. §12208.

kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.[27]

Supreme Court Cases

The Supreme Court has decided several cases relating to the definition of disability. The first ADA case to address the definitional issue was *Bragdon v. Abbott*, a case involving a dentist who refused to treat an HIV infected individual outside of a hospital.[28] In *Bragdon,* the Court found that the plaintiff's asymptomatic HIV infection was a physical impairment impacting on the major life activity of reproduction thus rending HIV infection a disability under the ADA. The other decisions—*Sutton v. United Airlines,*[29] *Murphy v. United Parcel Service, Inc.,*[30] *Albertsons Inc. v. Kirkingburg*,[31] and *Toyota Motor Manufacturing v. Williams*[32]—all involved issues which Congress later addressed in the ADA Amendments Act. Thus, although these decisions are of historical interest, especially regarding the impetus for the enactment of the ADA Amendments Act, they can no longer be assumed to be valid precedent and therefore will only be briefly discussed here.

Bragdon v. Abbott

The Supreme Court in *Bragdon v. Abbott* addressed the ADA definition of individual with a disability and held that the respondent's asymptomatic HIV infection was a physical impairment impacting on the major life activity of reproduction thus rendering the HIV infection a disability under the ADA.[33] In 1994, Dr. Bragdon performed a dental examination on Ms. Abbott and discovered a cavity. Ms. Abbott had indicated in her registration form that she was HIV positive but at that time she was asymptomatic. Dr. Bragdon told her that he would not fill her cavity in his office but would treat her only in a hospital setting. Ms. Abbott filed an ADA complaint and prevailed at the district court, courts of appeals and the Supreme Court on the issue of whether she was an individual with a disability but the case was remanded for further consideration regarding the issue of direct threat.

In arriving at its holding, Justice Kennedy, writing for the majority, first looked to whether Ms. Abbott's HIV infection was a physical impairment. Noting the immediacy with which the HIV virus begins to damage an individual's white blood cells, the Court found that asymptomatic HIV infection was a physical impairment. Second, the Court examined whether this physical impairment affected a major life activity and concluded that the HIV infection placed a substantial limitation on her ability to reproduce and to bear children and that reproduction was a major life activity. Finally, the Court examined whether the physical impairment was a substantial limitation on the major life activity of reproduction. After evaluating the medical evidence, the Court concluded that Ms. Abbott's ability to reproduce was substantially limited in two ways: (1)

---

[27] 42 U.S.C. §12211.

[28] 524 U.S. 624 (1998). For a more detailed discussion of this decision, see CRS Report 98-599, *The Americans with Disabilities Act: HIV Infection is Covered Under the Act*, by Nancy Lee Jones.

[29] 527 U.S. 471 (1999). *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2004).

[30] 527 U.S. 516 (1999).

[31] 527 U.S. 555 (1999).

[32] 534 U.S. 184 (2002).

[33] 524 U.S. 624 (1998).

an attempt to conceive would impose a significant risk on Ms. Abbott's partner, and (2) an HIV infected woman risks infecting her child during gestation and childbirth.[34]

Sutton v. United Airlines, Murphy v. United Parcel Service, and *Albertsons, Inc. v Kirkingburg*

Three Supreme Court decisions in 1999 addressed the definition of disability and specifically discussed the concept of mitigating measures. *Sutton v. United Air Lines* involved sisters who were rejected from employment as pilots with United Air Lines because they wore eyeglasses. The Supreme Court in *Sutton* examined the definition of disability used in the original ADA and found that the determination of whether an individual has a disability should be made with reference to measures that mitigate the individual's impairment. The *Sutton* Court stated: '"a disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." The Court also emphasized that the statement of findings in the ADA that some 43,000,000 Americans have one or more physical or mental disability "requires the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities."

Similarly, in *Murphy v. United Parcel Service, Inc*., the Court held that the fact that an individual with high blood pressure was unable to meet the Department of Transportation (DOT) safety standards was not sufficient to create an issue of fact regarding whether an individual is regarded as unable to utilize a class of jobs. The Court in *Murphy* found that an employee is regarded as having a disability if the covered entity mistakenly believes that the employee's actual, nonlimiting impairment substantially limits one or more major life activities. And in the last of this trilogy of 1999 cases, the Court in *Albertsons v. Kirkingburg* held that a trucker with monocular vision who was able to compensate for this impairment was not a person with a disability.

Toyota Motor Manufacturing of Kentucky v. Williams

In the 2002 case of *Toyota Motor Manufacturing v. Williams,* the meaning of "substantially limits" was examined, and Justice O'Connor, writing for the unanimous Court, determined that the word substantial "clearly precluded impairments that interfere in only a minor way with the performance of manual tasks." The Court also found that the term "major life activity" "refers to those activities that are of central importance to daily life." Finding that these terms are to be "interpreted strictly," the Court held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

[34] Another major issue addressed in *Bragdon* involved the interpretation of the ADA's direct threat exemption which will be discussed in the section on public accommodations. For a more detailed discussion of *Bragdon*, see CRS Report 98-599, *The Americans with Disabilities Act: HIV Infection is Covered Under the Act*, by Nancy Lee Jones.

Application of the Eleventh Amendment to the ADA

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has found that the Eleventh Amendment cannot be abrogated by the use of Article I powers but that Section 5 of the Fourteenth Amendment can be used for abrogation in certain circumstances. Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

The circumstances where Section 5 of the Fourteenth Amendment can be used to abrogate the Eleventh Amendment were discussed in the Supreme Court decisions in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board,*[35] *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*,[36] and *Kimel v. Florida Board of Regents*.[37] They reiterated the principle that the Congress may abrogate state immunity from suit under the Fourteenth Amendment and found that there were three conditions necessary for successful abrogation.

- Congressional power is limited to the enactment of "appropriate" legislation to enforce the substantive provisions of the Fourteenth Amendment.
- The legislation must be remedial in nature.
- There must be a "congruence and proportionality" between the injury to be prevented and the means adopted to that end.

The ADA uses both the Fourteenth Amendment and the Commerce Clause of the Constitution as its constitutional basis.[38] It also specifically abrogates state immunity under the Eleventh Amendment.[39] The ADA, then, is clear regarding its attempt to abrogate state immunity; the issue is whether the other elements of a successful abrogation are present. The Supreme Court in *Garrett v. University of Alabama* found that they were not with regard to Title I while in *Tennessee v. Lane* the Court upheld Title II as it applies to the access to courts.[40] Most recently, the Supreme Court in *United States v. Georgia,*[41] held that Title II of the ADA created a private

[35] 527 U.S. 666 (1999) (The Trademark Remedy Clarification Act, TRCA, which subjected states to suit for false and misleading advertising, did not validly abrogate state sovereign immunity; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a property right protected by the Due Process Clause).

[36] 527 U.S. 627 (1999)(Congress may abrogate state sovereign immunity but must do so through legislation that is appropriate within the meaning of Section 5 of the Fourteenth Amendment; Congress must identify conduct that violates the Fourteenth Amendment and must tailor its legislation to remedying or preventing such conduct).

[37] 528 U.S. 62 (2000).

[38] 42 U.S.C. §12101(b)(4). The Commerce Clause would not be sufficient authority on which to abrogate state sovereign immunity since the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[39] 42 U.S.C. §12202.

[40] It should be noted that the Eleventh Amendment applies only to states, not municipalities. See e.g., *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004).

[41] 546 U.S. 151 (2006).

cause of action for damages against the states for conduct that actually violates the Fourteenth Amendment. However, the Court did not reach the issue of whether the Eleventh Amendment permits a prisoner to secure money damages from a state for state actions that violate the ADA but not the Constitution.

Employment

General Requirements

Statutory and Regulatory Requirements

Title I of the ADA, as amended by the ADA Amendments Act of 2008, provides that no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[42] The term *employer* is defined as a person engaged in an industry affecting commerce who has 15 or more employees.[43] Therefore, the employment section of the ADA, unlike the section on public accommodations, which will be discussed subsequently, is limited in scope to employers with 15 or more employees. This parallels the coverage provided in the Civil Rights Act of 1964. As noted previously, the Supreme Court, in *Arbaugh v. Y. & H. Corp.*,[44] held that the 15-employee limitation in Title VII of the Civil Rights Act[45] was not jurisdictional, but rather was related to the substantive adequacy of a claim. Thus, if the defense that the employer employs fewer than 15 employees is not raised in a timely manner, a court is not obligated to dismiss the case. Because the ADA's 15-employee limitation language parallels that of Title VII, it is likely that a court would interpret the ADA's requirement in the same manner.

The term *employee* with respect to employment in a foreign country includes an individual who is a citizen of the United States; however, it is not unlawful for a covered entity to take action that constitutes discrimination with respect to an employee in a workplace in a foreign country if compliance would cause the covered entity to violate the law of the foreign country.[46]

---

[42] 42 U.S.C. §12112(a), as amended by P.L. 110-325, §5. The ADA Amendments Act strikes the prohibition of discrimination against a qualified individual with a disability because of the disability of such individual and substitutes the prohibition of discrimination against a qualified individual "on the basis of disability." The Senate Managers' Statement noted that this change "ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" 153 CONG. REC. S .8347 (September 11, 2008)(Statement of Managers to Accompany S. 3406, the Americans with Disabilities Act Amendments Act of 2008). Two courts of appeal have held that the prohibition of discrimination in the "terms, conditions, or privileges of employment" creates a viable cause of action for disability-based harassment. See *Flowers v. Southern Reg'l Physician Servs, Inc.*, 247 F.3d 229 (5th Cir. 2001); *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001); *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003).

[43] 42 U.S.C. §12111(5).

[44] *Arbaugh v. Y. & H. Corp.*, 546 U.S. 500 (2006).

[45] 42 U.S.C. §2000e(b).

[46] P.L. 102-166 added this provision.

If the issue raised under the ADA is employment related, and the threshold issues of meeting the definition of an individual with a disability and involving an employer employing more than 15 individuals are met, the next step is to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.

Title I defines a "qualified individual with a disability." Such an individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires."[47] The ADA incorporates many of the concepts set forth in the regulations promulgated pursuant to Section 504, including the requirement to provide reasonable accommodation unless the accommodation would pose an undue hardship on the operation of the business.[48]

"Reasonable accommodation" is defined in the ADA as including making existing facilities readily accessible to and usable by individuals with disabilities, and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment of examinations or training materials or policies, provision of qualified readers or interpreters or other similar accommodations.[49] "Undue hardship" is defined as "an action requiring significant difficulty or expense."[50] Factors to be considered in determining whether an action would create an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility, the overall financial resources of the covered entity, and the type of operation or operations of the covered entity.

Reasonable accommodation and the related concept of undue hardship are significant concepts under the ADA and are one of the major ways in which the ADA is distinguishable from Title VII jurisprudence. The statutory language paraphrased above provides some guidance for employers but the details of the requirements have been the subject of numerous judicial decisions. In addition, the EEOC issued detailed enforcement guidance on these concepts on March 1, 1999,[51] which was amended on October 17, 2002, to reflect the Supreme Court's decision in *U.S. Airways v. Barnett.*[52] Although much of the guidance reiterates long-standing EEOC interpretations in a

---

[47] 42 U.S.C. §1211(8). The EEOC has stated that a function may be essential because (1) the position exists to perform the duty, (2) there are a limited number of employees available who could perform the function, or (3) the function is highly specialized. 29 C.F.R. §1630(n)(2). A number of issues have been litigated concerning essential functions. For example, some courts have found that regular attendance is an essential function of most jobs. See e.g., *Carr v. Reno*, 23 F.3d 525 (D.C.Cir. 1994), *Brenneman v. Medcentral Health System*, 366 F.3d 412 (6th Cir. 2004), *cert. denied*, 543 U.S. 1114 (2005)("the record is replete with evidence of plaintiff's excessive absenteeism, which rendered him unqualified for that position.") In *Mulloy v. Acushnet Co.*, 460 F.3d 141 (1st Cir. 2006), the first circuit found that an essential function of the job at issue included being physically present at the plant in order to perform troubleshooting and take corrective actions and found that the plaintiff could not perform the job's essential functions remotely. In *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001), the tenth circuit held that a crime investigator with MS was not otherwise qualified to perform his job duties since it would be very difficult for him to stand or walk for prolonged periods, to run or to physically restrain persons. Similarly, a nurse with a back injury that prevented her from lifting more than 15 or 20 pounds was not a qualified individual with a disability since the ability to lift fifty pounds was an essential function of her job. *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001).

[48] See 45 C.F.R. Part 84.

[49] 42 U.S.C. §12111(9).

[50] 42 U.S.C. §12111(10).

[51] EEOC, "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," No. 915.002 (March 1, 1999).

[52] http://www.eeoc.gov/policy/docs/accommodation.html#requesting.

question and answer format, the EEOC also took issue with some judicial interpretations.[53] Notably the EEOC stated that

- an employee who is granted leave as a reasonable accommodation is entitled to return to his or her same position, unless this imposes an undue hardship; and
- an employer is limited in the ability to question the employee's documentation of a disability ("An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.").

Issues regarding the amount of money that must be spent on reasonable accommodations have also arisen. The EEOC regulations[54] and guidance provide that an employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer.[55] However, the Seventh Circuit in *Vande Zande v. State of Wisconsin Department of Administration*[56] found that the cost of the accommodation cannot be disproportionate to the benefit. "Even if an employer is so large or wealthy—or, like the principal defendant in this case, is a state, which can raise taxes in order to finance any accommodations that it must make to disabled employees—that it may not be able to plead 'undue hardship', it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee."[57]

Clackamas Gastroenterology Associates P.C. v. Wells

The Supreme Court examined the definition of the term "employee" under the ADA in *Clackamas Gastroenterology Associates P.C. v. Wells.*[58] In *Clackamas,* the Court held in a 7-2 decision written by Justice Stevens, that the EEOC's guidelines concerning whether a shareholder-director is an employee were the correct standard to use. Since the evidence was not clear, the case was remanded for further proceedings. Clackamas Gastroenterology Associates is a medical clinic in Oregon that employed Ms. Wells as a bookkeeper from 1986-1997. After her termination from employment, Ms. Wells brought an action alleging unlawful discrimination on the basis of discrimination under Title I of the ADA. The clinic denied that it was covered by the ADA since it argued that it did not have 15 or more employees for the 20 weeks per year required by the statute. The determination of coverage was dependent on whether the four physician-shareholders who owned the professional corporation were counted as employees.

The Court first looked to the definition of employee in the ADA which states that an employee is "an individual employed by an employer."[59] This definition was described as one which is

[53] It should be emphasized that the EEOC's guidance does **not** have the force of regulations and courts are not bound to follow the guidance although some courts do defer to agency expertise.

[54] 29 C.F.R. §1630.9.

[55] http://www.eeoc.gov/policy/docs/accommodation.html.

[56] 44 F.3d 538 (7th Cir. 1995).

[57] *Id.* At 542-543. See also *Schmidt v. Methodist Hospital of Indiana*, 89 F.3d 342 (7th Cir. 1996), where the court found that reasonable accommodation does not require an employer to provide everything an employee requests.

[58] 538 U.S. 440 (2003).

[59] 42 U.S.C. §12111(4).

"completely circular and explains nothing." The majority then looked to common law, specifically the common law element of control. This is the position advocated by the EEOC. The EEOC has issued guidelines which list six factors to be considered in determining whether the individual acts independently and participates in managing the organization or whether the individual is subject to the organization's control and therefore an employee. These six factors are:

> Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; Whether and, if so, to what extent the organization supervises the individual's work; Whether the individual reports to someone higher in the organization; Whether and, if so, to what extent the individual is able to influence the organization; Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and Whether the individual shares in the profits, losses, and liabilities of the organization.[60]

Justice Stevens, writing for the majority, found that some of the district court's findings of fact, when considered in light of the EEOC's standard, appeared to favor the conclusion that the four physicians were not employees of the clinic. However, since there was some evidence that might support the opposite conclusion, the Court remanded the case for further proceedings.

Justice Ginsburg, joined by Justice Breyer, dissented from the majority's opinion. The dissenters argued that the Court's opinion used only one of the common-law aspects of a master-servant relationship. In addition, Justice Ginsburg noted that the physician-shareholders argued they were employees for the purposes of other statutes, notably the Employee Retirement Income Security Act of 1974 (ERISA) and stated "I see no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for the purposes of federal antidiscrimination statutes."

Other Supreme Court Employment Cases

Many of the Supreme Court decisions have involved employment situations although a number of these cases did not reach past the threshold issue of whether the individual alleging employment discrimination was an individual with a disability. There are still several significant employment issues, such as reasonable accommodations, which have not been dealt with by the Court. In addition, the landmark decision of *University of Alabama v. Garrett* on the application of the Eleventh Amendment arose in the employment context.

Receipt of SSI Benefits

The relationship between the receipt of SSDI benefits and the ability of an individual to pursue an ADA employment claim was the issue in *Cleveland v. Policy Management Systems Corp, supra*. The Supreme Court unanimously held that pursuit and receipt of SSDI benefits does not automatically stop a recipient from pursuing an ADA claim or even create a strong presumption against success under the ADA. Observing that the Social Security Act and the ADA both help individuals with disabilities but in different ways, the Court found that "despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the

[60] EEOC Compliance Manual §605:0009.

Court of Appeals here." The fact that the ADA defines a qualified individual as one who can perform the essential functions of the job with or without reasonable accommodation was seen as a key distinction between the ADA and the Social Security Act. In addition, the Court observed that SSDI benefits are sometimes granted to individuals who are working.

The Seventh Circuit, in *Johnson v. ExxonmobilCorp.*,[61] applied the Supreme Court's analysis in *Cleveland* and distinguished the factual situations. In *Cleveland* the plaintiff had argued that she had made consistent statements in her ADA claim and in the SSDI application; however, in *Johnson* the Seventh Circuit found that the plaintiff had merely argued that "he was mistaken in his SSDI application." The court of appeals concluded that "*Cleveland* does not stand for the proposition that defendants should be allowed to explain why they gave false statements on their SSDI applications, which is essentially what Johnson seeks to do here."[62]

"Qualified" Individual with a Disability

In *Albertsons, Inc. v. Kirkingburg,*[63] the Supreme Court held that an employer need not adopt an experimental vision waiver program. Title I of the ADA prohibits discrimination in employment against a "qualified" individual with a disability. In finding that the plaintiff's inability to comply with the general regulatory vision requirements rendered him unqualified, the Court framed the question in the following manner. "Is it reasonable ... to read the ADA as requiring an employer like Albertsons to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally and without any finding of its being inappropriate?" Answering this question in the negative, the Court observed that employers should not be required to "reinvent the Government's own wheel" and stated that "it is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms."

In *Chevron U.S.A. Inc., v. Echazabal*,[64] the Supreme Court held unanimously that the ADA does not require an employer to hire an individual with a disability if the job in question would endanger the individual's health. The ADA's statutory language provides for a defense to an allegation of discrimination that a qualification standard is "job related and consistent with business necessity."[65] The act also allows an employer to impose as a qualification standard that the individual shall not pose a direct threat to the health or safety of other individuals in the workplace[66] but does not discuss a threat to the individual's health or safety. The Ninth Circuit in *Echazabal* had determined that an employer violated the ADA by refusing to hire an applicant with a serious liver condition whose illness would be aggravated through exposure to the

[61] 426 F.3d 887 (7th Cir. 2005).

[62] *Id.* at 892.

[63] 527 U.S. 555 (1999).

[64] 536 U.S. 73 (2002).

[65] 42 U.S.C. §12113(a).

[66] 42 U.S.C. §12113(b).

chemicals in the workplace.[67] The Supreme Court rejected the Ninth Circuit decision and upheld a regulation by the EEOC that allows an employer to assert a direct threat defense to an allegation of employment discrimination where the threat is posed only to the health or safety of the individual making the allegation.[68] Justice Souter found that the EEOC regulations were not the kind of workplace paternalism that the ADA seeks to outlaw. "The EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job." The Court emphasized that a direct threat defense must be based on medical judgment that uses the most current medical knowledge.

The Supreme Court had examined an analogous issue in *UAW v. Johnson Controls, Inc.*,[69] which held that under the Civil Rights Act of 1964 employers could not enforce "fetal protection" policies that kept women, whether pregnant or with the potential to become pregnant, from jobs that might endanger a developing fetus. Although this case was raised by the plaintiff, the Supreme Court distinguished the decision there from that in *Echazabal*. The *Johnson Controls* decision was described as "concerned with paternalistic judgments based on the broad category of gender, while the EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments."

Collective Bargaining Agreements

The interplay between rights under the ADA and collective bargaining agreements was the subject of the Supreme Court's decision in *Wright v. Universal Maritime Service Corp., supra.* The Court held there that the general arbitration clause in a collective bargaining agreement does not require a plaintiff to use the arbitration procedure for an alleged violation of the ADA. However, the Court's decision was limited since the Court did not find it necessary to reach the issue of the validity of a union-negotiated waiver. In other words, the Court found that a general arbitration agreement in a collective bargaining agreement is not sufficient to waive rights under civil rights statutes but situations where there is a specific waiver of ADA rights were not addressed.[70]

Reasonable Accommodations and Seniority Systems

The Supreme Court in *U.S. Airways v. Barnett*[71] held that an employer's showing that a requested accommodation by an employee with a disability conflicts with the rules of a seniority system is ordinarily sufficient to establish that the requested accommodation is not "reasonable" within the meaning of the ADA. The Court, in a majority opinion by Justice Breyer, observed that a seniority system, "provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment" and that to require a "typical employer to show more than the existence of a seniority system might undermine the employees' expectations of consistent, uniform treatment." Thus, in most ADA cases, the existence of a seniority system would entitle an

[67] 226 F.3d 1063 (9th Cir. 2000).

[68] 29 C.F.R. §1630.15(b)(2).

[69] 499 U.S. 187 (1991).

[70] For more information, see CRS Report RL30008, *Labor and Mandatory Arbitration Agreements: Background and Discussion*, by Jon O. Shimabukuro.

[71] 535 U.S. 391 (2002).

employer to summary judgment in its favor. The Court found no language in the ADA which would change this presumption if the seniority system was imposed by management and not by collective bargaining. However, Justice Breyer found that there were some exceptions to this rule for "special circumstances" and gave as examples situations where (1) the employer "fairly frequently" changes the seniority system unilaterally, and thereby diminishes employee expectations to the point where one more departure would "not likely make a difference" or (2) the seniority system contains so many exceptions that one more exception is unlikely to matter.

Although the majority in *Barnett* garnered five votes, the Court's views were splintered. There were strong dissents and two concurring opinions. In her concurrence, Justice O'Connor stated that she would prefer to say that the effect of a seniority system on the ADA depends on whether the seniority system is legally enforceable but that since the result would be the same in most cases as under the majority's reasoning, she joined with the majority to prevent a stalemate. The dissents took vigorous exception to the majority's decision with Justice Scalia, joined by Justice Thomas, arguing that the ADA does not permit any seniority system to be overridden. The dissent by Justice Souter, joined by Justice Ginsberg, argued that nothing in the ADA insulated seniority rules from a reasonable accommodation requirement and that the legislative history of the ADA clearly indicated congressional intent that seniority systems be a factor in reasonable accommodations determinations but not the major factor.

Rehiring of Individual Who Has Been Terminated for Illegal Drug Use

In *Raytheon Co. v. Hernandez*,[72] the Supreme Court was presented with the issue of whether the ADA confers preferential rehiring rights on employees who have been lawfully terminated for misconduct, in this case illegal drug use. However, the Court, in an opinion by Justice Thomas, did not reach this issue, finding that the Ninth Circuit had improperly applied a disparate impact analysis in a disparate treatment case and remanding the case. The Court observed that it "has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact." Disparate treatment was described as when an employer intentionally treats some people less favorably than others because of a protected characteristic such as race and liability depends on whether the protected trait actually motivated the employer's decision. Disparate impact, in contrast, involves practices that are facially neutral but in fact impact a protected group more harshly and cannot be justified by business necessity. Disparate impact cases do not require evidence of an employer's subjective intent.[73]

Employment Inquiries Relating to a Disability

Before an offer of employment is made, an employer may not ask a disability related question or require a medical examination.[74] The EEOC in its guidance on this issue stated that the rationale for this exclusion was to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition.[75] Once an offer is

[72] 540 U.S. 44 (2003).

[73] Upon review, the Ninth Circuit Court of Appeals reversed and remanded the district court's grant of the employer's motion for summary judgment. *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564 (9th Cir. 2004).

[74] 42 U.S.C. §12112.

[75] EEOC, "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," (continued...)

made, disability related questions and medical examinations are permitted as long as all individuals who have been offered a job in that category are asked the same questions and given the same examinations.[76] It is not always clear exactly what is a medical test. In *Karraker v. Rent-a-Center, Inc.,*[77] the Seventh Circuit examined the issue of whether an employer's use of the Minnesota Multiphasic Personality Inventory (MMPI) in order to obtain a promotion violated the ADA. The MMPI contains questions such as "I commonly hear voices without knowing where they are coming from" and "I see things or animals or people around me that others do not see." The court found that, even though the test was not interpreted by a psychologist, the MMPI was a medical test since it was designed in part to reveal mental illness.

The events of September 11, 2001, raised questions concerning whether an employer may ask employees whether they will require assistance in the event of an evacuation because of a disability or medical condition. The EEOC issued a fact sheet stating that employers are allowed to ask employees to self-identify if they will require assistance because of a disability or medical conditions and providing details on how the employer may identify individuals who may require assistance.[78] Similarly, the 2009 H1N1 influenza pandemic also raised issues concerning inquiries relating to a disability, and the EEOC has issued guidance for employers.[79]

Defenses to a Charge of Discrimination

The ADA specifically lists defenses that may be applied to a charge of discrimination. If an employer can demonstrate that qualification standards, tests, or other selection criteria that may disqualify an individual with a disability are "job-related, … consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation," the employer may not be liable under the ADA.[80] The ADA further states that such standards, tests, and criteria may not be used to disqualify an individual based on his or her uncorrected vision unless the requirement is job-related and consistent with business necessity.[81]

Employers may discriminate against an individual with a disability if he or she poses a direct threat to the health or safety of other individuals in the workplace.[82] The EEOC has indicated that the following factors should be considered when determining whether an individual poses a direct threat: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.[83]

(...continued)

October 10, 1995.

[76] *Id.*

[77] 411 F.3d 831 (7th Cir. 2005). For a more detailed discussion of this case, see Maureen E. Mulvihill, "*Karraker v. Rent-a-Center:* Testing the Limits of the ADA, Personality Tests, and Employer Preemployment Screening," 37 LOY. U. CHI. L. J. 865 (2006).

[78] http://www.eeoc.gov/facts/evacuation.html. For a detailed discussion of emergency procedures for employees with disabilities, see Federal Emergency Management Agency, "Emergency Procedures for Employees with Disabilities in Office Occupancies." http://www.securitymanagement.com/library/disable.html.

[79] See http://www.eeoc.gov/facts/pandemic_flu.html. For a discussion of these issues, see CRS Report R40866, *The Americans with Disabilities Act (ADA): Employment Issues and the 2009 Influenza Pandemic*, by Nancy Lee Jones.

[80] 42 U.S.C. §12113(a).

[81] 42 U.S.C. §12113(c).

[82] 42 U.S.C. §12113(b).

[83] 29 C.F.R. §1630.2(r).

The ADA includes two exceptions for religious organizations. First, religious entities may "[give] preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities."[84] Second, religious entities may require applicants and employees to conform to their religious tenets.[85] In addition to these statutory protections, the Supreme Court has affirmed additional constitutional protections available to religious employers. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* a teacher at a religious school challenged her termination under the ADA after the school fired her following her disability leave.[86] The Court recognized the constitutional ministerial exception to employment discrimination laws, explaining that religious institutions must be permitted to select employees who are responsible for carrying out the institution's mission.[87] Thus, the ministerial exception may be claimed by religious employers with respect to ministers and ministerial employees only. The ministerial exception prevents governmental interference in decisions regarding these employees in conformance with the constitutional requirements of the First Amendment.[88]

Finally, employers may avoid liability under the ADA for decisions that discriminate against individuals with an infectious or communicable disease if the disease may be transmitted through food handling and the job involves such duties.[89] To claim this defense, the disease must be listed by the Secretary of Health And Human Services as an infectious disease transmitted through food handling and must not be able to be eliminated by reasonable accommodation.[90]

Drugs, Alcohol, and Employer Conduct Rules

A controversial issue that arose during the enactment of the ADA regarding employment concerned the application of the act to drug addicts and alcoholics. The ADA provides that, with regard to employment, *current* illegal drug users are not considered to be qualified individuals with disabilities. However, former drug users and alcoholics would be covered by the act if they are able to perform the essential functions of the job. Exactly what is "current" use of illegal drugs has been the subject of some discussion. The EEOC has defined current to mean that the illegal drug use occurred "recently enough" to justify an employer's reasonable belief that drug use is an ongoing problem.[91] The courts that have examined this issue have generally found that to be covered by the ADA, the individual must be free of drugs for a considerable period of time, certainly longer than weeks.[92]

---

[84] 42 U.S.C. §12113(d)(1). This exception for religious organizations mirrors the exception provided in Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, national origin, or sex. *See* 42 U.S.C. §2000e et seq. For a legal analysis of the applicability of the exception, see CRS Report RS22745, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations*, by Cynthia Brougher.

[85] 42 U.S.C. §12113(d)(2).

[86] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012).

[87] *Id*. at 710.

[88] *Id*. at 703 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own [ministers].").

[89] 42 U.S.C. §12113(e)(2).

[90] *Id*. The Secretary of Health and Human Services maintains a list of infectious and communicable diseases transmitted through the food supply. *See* 74 *Federal Register* 61151 (November 23, 2009).

[91] 29 C.F.R. Appendix §1630.3.

[92] See e.g., *Shafer v. Preston Memorial Hospital Corp.*, 107 F.3d 274 (4th Cir. 1997)(individual is a current user if he or (continued...)

In the appendix to its regulations, EEOC further notes that "an employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity."[93] Title I of the ADA also provides that a covered entity may prohibit the illegal use of drugs and the use of alcohol in the workplace.[94] Similarly, employers may hold all employees, regardless of whether or not they have a disability, to the same performance and conduct standards.[95] However, if the misconduct results from a disability, the employer must be able to demonstrate that the rule is job-related and consistent with business necessity.[96]

Remedies

The remedies and procedures set forth in Sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964,[97] are incorporated by reference. This provides for certain administrative enforcement as well as allowing for individual suits. The Civil Rights Act of 1991, P.L. 102-166, expanded the remedies of injunctive relief and back pay. A plaintiff who was the subject of unlawful intentional discrimination (as opposed to an employment practice that is discriminatory because of its disparate impact) may recover compensatory and punitive damages. In order to receive punitive damages, the plaintiff must show that there was a discriminatory practice engaged in with malice or with reckless indifference to the rights of the aggrieved individuals. The amount that can be awarded in punitive and compensatory damages is capped, with the amounts varying from $50,000 to $300,000 depending upon the size of the business.[98] Similarly, there is also a "good faith" exception to the award of damages with regard to reasonable accommodation.

The Lilly Ledbetter Fair Pay Act of 2009, P.L. 111-2, amends Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Enacted in response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.,*[99] the law states that an unlawful employment practice occurs, with respect to discrimination in compensation, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or practice, or when an individual is affected by application of a discriminatory compensation decision or practice. Liability for these discriminatory practices may accrue and an individual may obtain back pay for up to two years preceding the filing of the

(...continued)

she has illegally used drugs "in a periodic fashion during the weeks and months prior to discharge.")

[93] 29 C.F.R. Appendix §1630.3.

[94] 42 U.S.C. §12114(c); 29 C.F.R. §1630.16(b)(4).

[95] EEOC Compliance Manual §902.2(c)(4). See also *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047 (5th Cir. 1998)("the ADA does not insulate emotional or violent outbursts blamed on an impairment").

[96] EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002, p. 29 (March 25, 1997).

[97] 42 U.S.C. §§2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9.

[98] In *Gagliardo v. Connaught Laboratories*, 311 F.3d 565 (3d Cir. 2002), an employee who claimed that she was discriminated against due to her multiple sclerosis won an award of $2.3 million despite the ADA caps. The court found that the judge had properly proportioned the claims between the federal and state causes of action and found that the fact that the state law did not contain a cap indicated that it was intended to provide a remedy beyond the federal remedies.

[99] 550 U.S. 618 (2007).

charges.[100] P.L. 111-2 applies to Title I of the ADA which covers employment, and Section 503, 42 U.S.C. §12203, of the ADA, which prohibits retaliation and coercion.

It should also be noted that the Supreme Court addressed the issue of punitive damages in a Title VII sex discrimination case, *Kolstad v. American Dental Association.*[101] The Court held in *Kolstad* that plaintiffs are not required to prove egregious conduct to be awarded punitive damages; however, the effect of this holding is limited by the Court's determination that certain steps taken by an employer may immunize them from punitive damages. Since the ADA incorporates the Title VII provisions, the holding in *Kolstad* may be applicable to ADA employment cases as well.[102]

In *Equal Employment Opportunity Commission v. Wal-mart Stores, Inc.,*[103] the Tenth Circuit applied *Kolstad* and affirmed an award of punitive damages under the ADA. This case involved a hearing impaired employee of Wal-mart who sometimes required the assistance of an interpreter. After being employed for about two years in the receiving department, the employee was required to attend a training session but left when the video tape shown was not close captioned and no interpreter was provided. After refusing to attend in the absence of an interpreter, the employee was transferred to the maintenance department to perform janitorial duties. When he questioned the transfer and asked for an interpreter, he was again denied. After threatening to file a complaint with the EEOC, the employee was suspended and later terminated from employment. He then sued and won compensatory damages and $75,000 in punitive damages. On appeal, the Tenth Circuit examined the reasoning in *Kolstad* and concluded that the record in *Wal-mart* "is sufficient to resolve the questions of intent and agency laid out in *Kolstad.*" With regard to intent, the court reiterated the facts and further noted that the store manager, who ultimately approved the employee's suspension, had testified that he was familiar with the ADA and its provisions regarding accommodation, discrimination and retaliation. This was seen as sufficient for a reasonable jury to conclude that Wal-mart intentionally discriminated. Wal-mart had also made an agency argument, stating that liability for punitive damages was improper because the employees who discriminated against the employee did not occupy positions of managerial control. Looking again to the reasoning in *Kolstad*, the Tenth Circuit noted that the Wal-mart employees had authority regarding hiring and firing decisions and observed that such authority is an indicium of supervisory or managerial capacity.

Public Services

General Requirements

Title II of the ADA provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity

[100] For a discussion of the *Ledbetter* decision, see CRS Report RS22686, *Pay Discrimination Claims Under Title VII of the Civil Rights Act: A Legal Analysis of the Supreme Court's Decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, by Jody Feder. For a discussion of the legislation, see CRS Report RL31867, *Pay Equity Legislation*, by Benjamin Collins and Jody Feder.

[101] 527 U.S. 526 (1999).

[102] But see *Barnes v. Gorman*, 536 U.S. 181 (2002), where the Supreme Court held that punitive damages may not be awarded under Section 202 of the ADA.

[103] 187 F.3d 1241 (10th Cir. 1999).

or be subjected to discrimination by any such entity.[104] "Public entity" is defined as state and local governments, any department or other instrumentality of a state or local government and certain transportation authorities. The ADA does not apply to the executive branch of the federal government; the executive branch and the U.S. Postal Service are covered by Section 504 of the Rehabilitation Act of 1973.[105]

The Department of Justice (DOJ) promulgated regulations for Title II which were amended as published in the *Federal Register* on September 15, 2010. The regulations contain a specific section on program accessibility. Each service, program, or activity conducted by a public entity, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. However, a public entity is not required to make each of its existing facilities accessible.[106] Program accessibility is limited in certain situations involving historic preservation. In addition, in meeting the program accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens.[107] The amended Title II regulations adopt accessibility standards consistent with the new minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (Access Board). In order to provide "an important measure of clarity and certainty for public entities,"[108] DOJ's amended title II regulations add an "element by element safe harbor" provision where elements in covered facilities that were built or altered in accordance with the previous 1991 accessibility standards would not be required to be brought into compliance with the new standards until the elements were subject to a planned alteration. In addition, the amended regulations include more detailed standards for service animals,[109] power-driven mobility devices, ticketing, and effective communication.[110] The amended regulations took effect March 15, 2011, but compliance with the 2010 standards for accessible design is not required until March 15, 2012.

Title II of the ADA would also apply to state and local government emergency preparedness and response programs. The Department of Justice has issued an ADA guide for local governments, noting that "one of the most important roles of local government is to protect their citizenry from harm, including helping people prepare for and respond to emergencies. Making local government emergency preparedness and response programs accessible to people with disabilities is critical part of this responsibility. Making these programs accessible is also required by the ADA."[111]

---

[104] 42 U.S.C. §§12131-12133.

[105] 29 U.S.C. §794.

[106] 28 C.F.R. §35.150.

[107] *Id.* The Department of Justice provided a document containing examples of common ADA compliance problems by city governments that have been identified through the Department of Justice's ongoing enforcement efforts. See http://www.usdoj.gov/crt/ada/comprob.htm.

[108] 75 *Federal Register* 56207 (September 15, 2010). The Department of Justice amended existing Title II and Title III regulations. For a more detailed discussion of the safe harbor provision see CRS Report R41376, *The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations*, by Emily C. Barbour and James V. DeBergh.

[109] For a more detailed discussion of the provisions relating to service animals see CRS Report R41468, *The Americans with Disabilities Act (ADA) and Service Animals*, by Emily C. Barbour.

[110] 75 *Federal Register* 56164 (September 15, 2010). For a more detailed discussion of the changes generally see CRS Report R41376, *The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations*, by Emily C. Barbour and James V. DeBergh.

[111] http://www.usdoj.gov/crt/ada/emergencyprep.htm. For a more detailed discussion of these issues, see CRS Report (continued...)

Supreme Court Cases

Although Title II has not been the subject of as much litigation as Title I, several of the ADA cases to reach the Supreme Court have involved Title II. The most significant of these to date is *Tennessee v. Lane*.[112] In *Lane*, the Supreme Court held that Title II of the ADA, as it applies to the fundamental right of access to the courts, constitutes a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment. In addition, the Supreme Court in *United States v. Georgia.,*[113] held that Title II of the ADA created a private cause of action for damages against the states for conduct that actually violates the Fourteenth Amendment.

In the first ADA case to reach the Supreme Court, *Pennsylvania Department of Corrections v. Yeskey, supra,* the Court found in a unanimous decision that state prisons "fall squarely within the statutory definition of 'public entity'" for Title II. *Yeskey* involved a prisoner who was sentenced to 18 to 36 months in a Pennsylvania correctional facility but was recommended for placement in a motivational boot camp for first time offenders. If the boot camp was successfully completed, the prisoner would have been eligible for parole in six months. The prisoner was denied admission to the program due to his medical history of hypertension and sued under the ADA. The state argued that state prisoners were not covered under the ADA since such coverage would "alter the usual constitutional balance between the States and the Federal Government." The Supreme Court rejected this argument, observing that "the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt." The Court noted that prisoners receive many services, including medical services, educational and vocational programs and recreational activities so that the ADA language applying the "benefits of the services, programs, or activities of a public entity" is applicable to state prisons.[114] However, the Court in *Yeskey* did not address the constitutional issues.

In *Olmstead v. Georgia, supra,* the Supreme Court examined issues raised by state mental health institutions and held that Title II of the ADA requires states to place individuals with mental disabilities in community settings rather than institutions when the State's treatment professionals have determined that community placement is appropriate, community placement is not opposed by the individual with a disability, and the placement can be reasonably accommodated.[115] "Unjustified isolation ... is properly regarded as discrimination based on disability." The *Olmstead* case had been closely watched by both disability groups and state governments. Although disability groups have applauded the holding that undue institutionalization qualifies as discrimination by reason of disability, the Supreme Court did place certain limitations on this right. In addition to the agreement of the individual affected, the Court also dealt with the issue of what is a reasonable modification of an existing program and stated: "Sensibly construed, the

(...continued)

RS22254, *The Americans with Disabilities Act and Emergency Preparedness and Response*, by Emily C. Barbour.

[112] 541 U.S. 509 (2004).

[113] 546 U.S. 151 (2006).

[114] The Supreme Court had remanded this case for consideration of whether Yeskey was an individual with a disability. On remand, the district court held that he was not covered by the ADA since he was not substantially limited in a major life activity. *Yeskey v. Pennsylvania Department of Corrections*, 76 F.Supp. 2d 572 (M.D. Pa.1999).

[115] *Olmstead* has focused federal and state attention on the development of policies that would expand home and community-based care for individuals with disabilities. For a more detailed discussion of *Olmstead*, see CRS Report R40106, *Olmstead v. L.C.: Judicial and Legislative Developments in the Law of Deinstitutionalization*, by Emily C. Barbour.

fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." This examination of what constitutes a reasonable modification may have implications for the interpretation of similar concepts in the employment and public accommodations Titles of the ADA.[116]

Other Title II Cases

Courts have examined various other issues regarding compliance with Title II. For example, in *Crowder v. Kitagawa*, a Hawaii regulation requiring the quarantine of all dogs, including guide dogs for visually impaired individuals, was found to violate Title II.[117] Other Title II cases have involved whether curb ramps are required,[118] the application of Title II to a city ordinance allowing open burning,[119] and the application of the ADA to a city's zoning ordinances.[120]

Transportation Provisions

Title II also provides specific requirements for public transportation by intercity and commuter rail and for public transportation other than by aircraft or certain rail operations.[121] All new vehicles purchased or leased by a public entity that operates a fixed route system must be accessible, and good faith efforts must be demonstrated with regard to the purchase or lease of accessible use vehicles. Retrofitting of existing buses is not required. Paratransit services must be provided by a public entity that operates a fixed route service, other than one providing solely

[116] See also *Frederick L., Nina S., Kevin C. And Steven F. v. Department of Public Welfare*, 422 F.3d 151 (3d Cir. 2005), where the court found that Pennsylvania's Department of Public Welfare was obligated to integrate eligible patients into local community-based settings and was required to articulate a commitment to this requirement in a specific comprehensive, effectively working, plan before it could utilize a "fundamental alteration" defense.

[117] *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996). The court stated: "Although Hawaii's quarantine requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others. Because of the unique dependence upon guide dogs among many of the visually-impaired, Hawaii's quarantine effectively denies these persons ... meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others."

[118] In *Kinney v. Yerusalim*, 812 F.Supp. 547 (E.D. Pa. 1993), *aff'd* 9 F.3d 1067 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994), the court found that street repair projects must include curb ramps for individuals with disabilities. Similarly, see *Ability Center of Greater Toledo v. Lechner*, 385 F.3d 901 (6th Cir. 2004), where the court held that Title II "does not merely prohibit intentional discrimination. It also imposes on public entities the requirement that they provide qualified disabled individuals with meaningful access to public services, which in certain instances necessitates that public entities take affirmative steps to remove architectural barriers to such access in the process of altering existing facilities." At 912. See also *Barden v. Sacramento*, 292 F.3d 1073 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003). See also 28 C.F.R. §35.151(e)(1), where the Department of Justice details the requirements for curb ramps.

[119] *Heather K. v. City of Mallard, Iowa*, 946 F.Supp. 1373 (N.D.Iowa 1996).

[120] *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997).

[121] 42 U.S.C. §§12141-12165. P.L. 104-287 added a new definition. The term "commuter rail transportation" has the meaning given the term "commuter rail passenger transportation" in 45 U.S.C. §502(9). For a more detailed discussion of the transportation provisions, see CRS Report RS22676, *Public Transportation Providers' Obligations Under the Americans with Disabilities Act (ADA)*, by Emily C. Barbour. Airplanes are covered by the Air Carriers Access Act, 49 U.S.C. §41705. For a discussion of this law, see CRS Report RL34047, *Overview of the Air Carrier Access Act (ACAA)*, by Emily C. Barbour.

commuter bus service.[122] Rail systems must have at least one car per train that is accessible to individuals with disabilities.[123]

Draft guidelines have been published by the Architectural and Transportation Barriers Compliance Board (Access Board) regarding the accessibility of public rights-of-way.[124] The purpose of the draft guidelines is to gather additional information for the regulatory assessment and the preparation of technical assistance materials to accompany a future rule. The Board will issue a notice of proposed rulemaking at a future date and will solicit comments at that time, prior to issuing a final rule.

Remedies

The enforcement remedies of Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. §794a, are incorporated by reference.[125] These remedies are similar to those of Title VI of the Civil Rights Act of 1964, and include damages and injunctive relief. The Attorney General has promulgated regulations relating to subpart A of the Title,[126] and the Secretary of Transportation has issued regulations regarding transportation.[127]

Barnes v. Gorman

The Supreme Court in *Barnes v. Gorman*[128] held in a unanimous decision that punitive damages may not be awarded under Section 202[129] of the ADA and Section 504 of the Rehabilitation Act of 1973.[130] Jeffrey Gorman uses a wheelchair and lacks voluntary control over his lower torso which necessitates the use of a catheter attached to a urine bag. He was arrested in 1992 after fighting with a bouncer at a nightclub and during his transport to the police station suffered significant injuries due to the manner in which he was transported. He sued the Kansas City police and was awarded over $1 million in compensatory damages and $1.2 million in punitive damages. The Eighth Circuit court of appeals upheld the award of punitive damages but the Supreme Court reversed. Although the Court was unanimous in the result, there were two concurring opinions and the concurring opinion by Justice Stevens, joined by Justices Ginsburg and Breyer, disagreed with the reasoning used in Justice Scalia's opinion for the Court.

Justice Scalia observed that the remedies for violations of both Section 202 of the ADA and Section 504 of the Rehabilitation Act are "coextensive with the remedies available in a private

[122] 42 U.S.C. §12143.

[123] 42 U.S.C. §12162.

[124] 70 *Federal Register* 70734 (November 23, 2005).

[125] 42 U.S.C. §12133.

[126] 28 C.F.R. Part 35.

[127] 49 C.F.R. Parts 27, 37, 38.

[128] 536 U.S. 181 (2002).

[129] 42 U.S.C. §12132. Section 203, 42 U.S.C. §12133, contains the enforcement provisions.

[130] 29 U.S.C. §794. Section 504 in relevant part prohibits discrimination against individuals with disabilities in any program or activity that receives federal financial assistance. The requirements of Section 504, its regulations, and judicial decisions were the model for the statutory language in the ADA where the nondiscrimination provisions are not limited to entities that receive federal financial assistance.

cause of action brought under Title VI of the Civil Rights Act of 1964."[131] Neither Section 504 nor Title II of the ADA specifically mention punitive damages, rather they reference the remedies of Title VI of the Civil Rights Act. Title VI is based on the congressional power under the Spending Clause[132] to place conditions on grants. Justice Scalia noted that Spending Clause legislation is "much in the nature of a contract" and, in order to be a legitimate use of this power, the recipient must voluntarily and knowingly accept the terms of the "contract." "If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[133] This contract law analogy was also found to be applicable to determining the scope of the damages remedies and, since punitive damages are generally not found to be available for a breach of contract, Justice Scalia found that they were not available under Title VI, Section 504 or the ADA.

Public Accommodations

General Requirements

Title III provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[134] Entities that are covered by the term "public accommodation" are listed, and include, among others, hotels, restaurants, theaters, auditoriums, laundromats, museums, parks, zoos, private schools, day care centers, professional offices of health care providers, and gymnasiums.[135] Religious institutions or entities controlled by religious institutions are not included on the list.

There are some limitations on the nondiscrimination requirements, and a failure to remove architectural barriers is not a violation unless such a removal is "readily achievable."[136] "Readily achievable" is defined as meaning "easily accomplishable and able to be carried out without much difficulty or expense."[137] Reasonable modifications in practices, policies or procedures are required unless they would fundamentally alter the nature of the goods, services, facilities, or privileges or they would result in an undue burden.[138] An undue burden is defined as an action involving "significant difficulty or expense."[139]

Title III contains a specific exemption for religious entities.[140] This applies when an entity is controlled by a religious entity. For example, a preschool that is run by a religious entity would

[131] 42 U.S.C. §2000d *et seq.*

[132] U.S. Const., Art. I §8, cl.1.

[133] *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[134] 42 U.S.C. §12182.

[135] 42 U.S.C. §12181.

[136] 42 U.S.C. §12182(b)(2)(A)(iv).

[137] 42 U.S.C. §12181.

[138] 42 U.S.C. §12182(b)(2)(A).

[139] 28 C.F.R. §36.104.

[140] 42 U.S.C. §12187.

not be covered under the ADA; however a preschool that is not run by a religious entity but that rents space from the religious entity, would be covered by Title III.

Similarly, Title III does not apply to private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964.[141] In interpreting this provision,[142] the Department of Justice has noted that courts have been most inclined to find private club status in cases where (1) members exercise a high degree of control over club operations, (2) the membership selection process is highly selective, (3) substantial membership fees are charged, (4) the entity is operated on a nonprofit basis, and (5) the club was not founded specifically to avoid compliance with federal civil rights law. Facilities of a private club lose their exemption, however, to the extent that they are made available for use by nonmembers as places of public accommodation.[143]

Title III also contains provisions relating to the prohibition of discrimination in public transportation services provided by private entities. Purchases of over-the-road buses are to be made in accordance with regulations issued by the Secretary of Transportation.[144]

The Department of Justice promulgated amendments to the Title III regulations that were amended as published in the *Federal Register* on September 15, 2010.[145] The amended Title III regulations adopt accessibility standards consistent with the new minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (Access Board). In addition, the regulations include more detailed standards for service animals[146] and power-driven mobility devices, ticketing, and effective communication,[147] and provide for an element by element "safe harbor" in certain circumstances. The amended regulations took effect March 15, 2011, but compliance with the 2010 standards for accessible design is not required until March 15, 2012.

Bragdon v. Abbott and Direct Threats to Health and Safety

The nondiscrimination mandate of Title III does not require that an entity permit an individual to participate in or benefit from the services of a public accommodation where such an individual poses a direct threat to the health or safety of others.[148] This issue was discussed by the Supreme

---

[141] 42 U.S.C. §2000a-3(a).

[142] 42 U.S.C. 12187.

[143] Department of Justice, "ADA Title III Technical Assistance Manual" III-1.6000.

[144] 42 U.S.C. §12184. This section was amended by P.L. 104-59 to provide that accessibility requirements for private over-the-road buses must be met by small providers within three years after the issuance of final regulations and with respect to other providers, within two years after the issuance of such regulations.

[145] 75 *Federal Register* 56164 (September 15, 2010). For a more detailed discussion of the changes generally see CRS Report R41376, *The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations*, by Emily C. Barbour and James V. DeBergh.

[146] For a more detailed discussion of the provisions relating to service animals see CRS Report R41468, *The Americans with Disabilities Act (ADA) and Service Animals*, by Emily C. Barbour.

[147] For a more detailed discussion the amended regulations regarding effective communication in the hospital setting see CRS Report 97-826, *Americans with Disabilities Act (ADA) Requirements Concerning the Provision of Interpreters by Hospitals and Doctors*, by James V. DeBergh. For a discussion of an advanced notice of proposed rulemaking (ANPR) regarding captioning see CRS Report R41659, *The Americans with Disabilities Act (ADA): Movie Captioning and Video Description*, by James V. DeBergh.

[148] For a more detailed discussion of this issue, see CRS Report RS22219, *The Americans with Disabilities Act (ADA) Coverage of Contagious Diseases*, by James V. DeBergh. The EEOC has discussed the concept of direct threat in the (continued...)

Court in *Bragdon v. Abbott, supra,* where the Court stated that "the existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." Dr. Bragdon had the duty to assess the risk of infection "based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." The Supreme Court remanded the case for further consideration of the direct threat issue. On remand, the First Circuit Court of Appeals held that summary judgment was warranted finding that Dr. Bragdon's evidence was too speculative or too tangential to create a genuine issue of fact.[149]

The Supreme Court declined to review a Fourth Circuit Court of Appeals decision regarding the direct threat exception to Title III. In *Montalvo v. Radcliffe,*[150] the Fourth Circuit held that excluding a child who has HIV from karate classes did not violate the ADA because the child posed a significant risk to the health and safety of others which could not be eliminated by reasonable modification.

Martin v. PGA Tour and "Fundamental Alteration"

In *Martin v. PGA Tour,* the Supreme Court in a 7-2 decision by Justice Stevens held that the ADA's requirements for equal access gave a golfer with a mobility impairment the right to use a golf cart in professional competitions.[151] The Ninth Circuit had ruled that the use of the cart was permissible since it did not "fundamentally alter" the nature of the competition.[152]

Title III of the ADA defines the term "public accommodation," specifically listing golf courses.[153] The majority opinion looked at this definition and the general intent of the ADA to find that golf tours and their qualifying rounds "fit comfortably within the coverage of Title III." The Court then discussed whether there was a violation of the substantive nondiscrimination provision of Title III. The ADA states that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."[154]

(...continued)

context of an influenza pandemic and determined that "[w]hether pandemic influenza rises to the level of a direct threat depends on the severity of the illness." http://www.eeoc.gov/facts/pandemic_flu.html.

[149] *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

[150] 167 F.3d 873 (4th Cir. 1999), *cert. denied*, 528 U.S. 813 (1999).

[151] 532 U.S. 661 (2001).

[152] 204 F.3d 994 (9th Cir. 2000).

[153] 42 U.S.C. §12181(7).

[154] 42 U.S.C. §12182(b)(2)(A)(ii)(emphasis added). The Department of Justice regulations echo the statutory language and provide the following illustration. "A health care provider may refer an individual with a disability to another provider if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services." 28 C.F.R. §36.302. The concept of fundamental alteration did not originate in the statutory language of the ADA but was derived from Supreme Court interpretation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which, in part, prohibits discrimination against an individual with a disability in any program or activity that receives federal financial assistance and was the model on which the ADA (continued...)

In theory, the Court opined, there might be a fundamental alteration of a golf tournament in two ways: (1) an alteration in an essential aspect of the game, such as changing the diameter of the hole, might be unacceptable even if it affected all players equally, or (2) a less significant change that has only a peripheral impact on the game might give a golfer with a disability an advantage over others and therefore fundamentally alter the rules of competition. Looking at both these types of situations, Justice Stevens found that a waiver of the walking rule for Casey Martin did not amount to a fundamental alteration. He noted that the essence of the game was shot-making and that the walking rule was not an indispensable feature of tournament golf as golf carts are allowed on the Senior PGA Tour as well as certain qualifying events. In addition, Justice Stevens found that the fatigue from walking the approximately five miles over five hours was not significant. Regarding the question of whether allowing Casey Martin to use a cart would give him an advantage, the majority observed that an individualized inquiry must be made concerning whether a specific modification for a particular person's disability would be reasonable under the circumstances and yet not be a fundamental alteration. In examining the situation presented, the majority found that Casey Martin endured greater fatigue even with a cart than other contenders do by walking.

Justice Scalia, joined by Justice Thomas, wrote a scathing dissent describing the majority's opinion as distorting the text of Title III, the structure of the ADA, and common sense. The dissenters contended that Title III of the ADA applies only to particular places and persons and does not extend to golf tournaments. The dissent also contended that "the rules are the rules," that they are by nature arbitrary, and there is no basis for determining any of them "non-essential."

Spector v. Norwegian Cruise Line, Ltd. and the Application of the ADA to Foreign Cruise Ships

The Supreme Court in *Spector v. Norwegian Cruise Line, Ltd.* held in a decision written by Justice Kennedy that the ADA applies to companies that operate foreign cruise ships in U.S. waters.[155] Prior to this decision there had been a split in the circuits with the Eleventh Circuit holding in *Stevens v. Premier Cruises Inc.*[156] that Title III of the ADA does apply to foreign cruise ships and the Fifth Circuit in *Spector v. Norwegian Cruise Lines*[157] holding that the ADA would not be applicable since applicability would impose U.S. law on foreign nations. The Supreme Court's decision specifically held that the statute is applicable to foreign ships in the United

(...continued)

was based. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Supreme Court addressed a suit by a hearing impaired woman who wished to attend a college nursing program. The college rejected her application because it believed her hearing disability made it impossible for her to participate safely in the normal clinical training program and to provide safe patient care. The Supreme Court found no violation of Section 504 and held that it did "not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program." Since Davis could not function in clinical courses without close supervision, the Court noted that the college would have had to limit her to academic courses. The Court further observed that "whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires." (At 409-410.) In conclusion, the Court found that "nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program." (At 414.)

[155] 545 U.S. 119 (2005).

[156] 215 F.3d 1237 (11th Cir. 2000), rehearing and rehearing en banc denied, 284 F.3d 1187 (11th Cir. 2002).

[157] 356 F.3d 641 (5th Cir. 2004).

States waters to the same extent that it is applicable to American ships in those waters. The majority concurred that cruise ships need not comply with the ADA if modifications would conflict with international legal obligations since the ADA only requires "readily achievable" accommodations. The 5-4 decision, however, was fragmented with various Justices joining for various aspects of the opinion. It is difficult, therefore, to determine exactly what type of accommodations would be required by the application of the ADA. Since the case below had been dismissed without a trial, it was remanded to determine the statutory requirements in this particular situation. The question of whether Title III requires any permanent and significant structural modifications that interfere with the international affairs of any cruise ship, foreign flag or domestic, was specifically left undecided. Justice Scalia, in his dissenting opinion, argued that the ADA should not be interpreted to apply in the absence of a clear statement from Congress.

ADA and the Internet

The ADA was enacted in 1990, prior to widespread use of the Internet, and does not specifically cover the Internet.[158] Similarly, the ADA regulations do not specifically mention the Internet. However, the Department of Justice has indicated that it believes the ADA does require Internet accessibility,[159] and has issued an advanced notice of rulemaking (ANPR) stating that it is considering revising the regulations implementing Titles II and III of the ADA to establish specific requirements for state and local governments and public accommodations to make their websites accessible to individuals with disabilities.[160] In a hearing in the 111th Congress, DOJ testified that although the ADA does not specifically mention the Internet, access to the Internet is a civil rights issue. DOJ further stated,

> the websites of entities covered by both Title II and Title III of the statute are required by law to ensure that their sites are fully accessible to individuals with disabilities. The Department is considering issuing guidance on the range of issues that arise with regard to the internet sites of private businesses that are public accommodations covered by Title III of the ADA. In so doing, the Department will solicit public comment from the broad range of parties interested in this issue.[161]

Although the ADA was amended in 2008 to respond to a series of Supreme Court decisions that had interpreted the definition of disability narrowly it did not address the issue of Internet coverage.[162] There has been no Supreme Court decision on point, and there have been few lower court judicial decisions. The lower courts that have examined the issue have split, creating some uncertainty. In addition, the use of a "nexus" approach in *National Federation of the Blind v.*

---

[158] For a more detailed discussion of this issue, see CRS Report R40462, *The Americans with Disabilities Act (ADA): Application to the Internet*, by James V. DeBergh. A similar issue is raised by electronic book readers. See http://www.ada.gov/kindle_ltr_eddoj.htm.

[159] *Achieving the Promise of the Americans with Disabilities Act in the Digital Age: Current Issues, Challenges, and Opportunities: Hearing Before the H. Subcommittee on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong., 2d Sess. (Testimony of Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights, Department of Justice), http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf.

[160] http://www.ada.gov/anprm2010/web%20anprm_2010.htm.

[161] *Id.*

[162] The ADA Amendments Act, P.L. 110-325. For a more detailed discussion of P.L. 110-325, see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Emily C. Barbour and James V. DeBergh.

Target Corporation,[163] requiring a connection between the Internet services and the physical place in order to present an actionable ADA claim, would limit the application of the ADA to on-line retailers. Despite this uncertainty, it would appear likely that the Department of Justice's position would prevail, especially in light of the ADA's broad nondiscrimination mandate.

The question of ADA coverage of internet sites will undoubtedly continue to be a closely watched issue.[164] It should be noted that this issue does not effect the requirement that federal government websites be accessible since the federal requirement is contained in a separate statute, Section 508 of the Rehabilitation Act.[165]

Vexatious Litigation

An issue which has prompted the introduction of bills in the last several Congresses involves the filing of multiple law suits by an individual with a disability based on de minimis violations and seeking money for a settlement.[166] Although these cases are seldom tried in court, *Molski v. Mandarin Touch Restaurant*[167] did result in an opinion finding that the plaintiff was a vexatious litigant who filed hundreds of law suits designed to harass and intimidate business owners into agreeing to cash settlements. The district court ordered the plaintiff to obtain the leave of the court prior to filing any other claims under the ADA. In a related suit, the California district court also found against the counsel in the *Molski* case holding that the counsel was required to seek leave of the court before filing any additional ADA claims.[168]

These two cases were upheld on appeal to the Ninth Circuit in *Molski v. Evergreen Dynasty Corp*.[169] After a detailed examination of the cases in light of standards for vexatious litigation, the Ninth Circuit noted the following:

---

[163] 452 F.Supp.2d 946 (N.D. Calif. 2006). The case was settled on August 27, 2008. See http://www.nfb.org. For a more detailed discussion of this case, see Isabel Arana DuPree, "Websites as 'Places of Public Accommodation': Amending the Americans with Disabilities Act in the Wake of *National Federal of the Blind v. Target Corporation*," NC J. L. & Tech. 273 (2007); Jeffrey Bashaw, "Applying the Americans with Disabilities Act to Private Websites after *National Federation of the Blind v. Target*," 4 Shidler J. L. Com. & Tech. 3 (2008).

[164] For a more detailed discussion of the issue, see National Council on Disability, "When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web," (July 10, 2003) http://www.ncd.gov/newsroom/publications/2003/adainternet.htm; The Association of the Bar of the City of New York, "Website Accessibility for People with Disabilities," 62 The Record 118 (2007); Steven Mendelsohn, and Martin Gould, "When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the World Wide Web," 7 Comp. L. Rev. & Tech. J. 173 (2004).

[165] 29 U.S.C. §794(d), as amended by P.L. 105-220. Section 508 requires that the electronic and information technology used by federal agencies be accessible to individuals with disabilities, including employees and member of the public. Generally, Section 508 requires each federal department or agency and the U.S. Postal Service to ensure that individuals with disabilities who are federal employees have access to and use of electronic and information technology that is comparable to that of individuals who do not have disabilities. For more detailed information, see http://www.section508.gov.

[166] See section on legislation *infra*. See also CRS Report RS22296, *The Americans with Disabilities Act: Legislation Concerning Notification Prior to Initiating Legal Action*, by Emily C. Barbour. For a discussion of vexatious lawsuits, see Wayne C. Arnold and Lisa D. Herzog, "How Many Lawsuits Does It Take to Declare an ADA Plaintiff Vexatious?" 48 Orange County Lawyer 50 (July 2006).

[167] 347 F.Supp.2d 860 (C.D.Calif. 2004).

[168] *Molski v. Mandarin Touch Restaurant*, 359 F.Supp.2d 924 (C.D.Calif. 2005).

[169] 500 F.3d 1047 (9th Cir. 2007), cert. denied, 129 S. Ct. 594, 172 L. Ed. 2d 455 (2008).

> For the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA. But as important as this goal is to disabled individuals and to the public, serial litigation can become vexatious when, as here, a large number of nearly-identical complaints contain factual allegations that are contrived, exaggerated, and defy common sense.[170]

Similarly, the court of appeals held that the district court was within its discretion to impose a prefiling order. The Ninth Circuit observed "[t]hat the Frankovich Group filed numerous complaints containing false factual allegations, thereby enabled Molski's vexatious litigation, provided the district court with sufficient grounds on which to base its discretionary imposition of sanctions."[171]

Other Judicial Decisions

In *Ford v. Schering-Plough Corporation,*[172] the Third Circuit found a disparity in benefits for physical and mental illnesses did not violate the ADA and found that the disability benefits at issue did not fall within Title III. The court stated "This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places."[173] This conclusion was found to be in keeping with judicial decisions under Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000(a).

Another issue under Title III is whether franchisers are subject to the Title. In *Nef v. American Dairy Queen Corp.,* the Fifth Circuit Court of Appeals found that a franchiser with limited control over the store a franchisee runs is not covered under Title III of the ADA.[174]

Remedies

The remedies and procedures of Title II of the Civil Rights Act of 1964 are incorporated in Title III of the ADA. Title II of the Civil Rights Act has generally been interpreted to include injunctive relief, not damages. In addition, state and local governments can apply to the Attorney General to certify that state or local building codes meet or exceed the minimum accessibility requirements of the ADA. The Attorney General may bring pattern or practice suits with a maximum civil penalty of $50,000 for the first violation and $100,000 for a violation in a subsequent case. The monetary damages sought by the Attorney General do not include punitive damages. Courts may also consider an entity's "good faith" efforts in considering the amount of the civil penalty. Factors to be considered in determining good faith include whether an entity could have reasonably anticipated the need for an appropriate type of auxiliary aid to accommodate the unique needs of a particular individual with a disability. Regulations relating to public accommodations have been promulgated by the Department of Justice[175] and regulations relating

[170] *Id*. at 38.

[171] *Id.* at 43.

[172] 145 F.3d 601(3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

[173] *Id.* at 612.

[174] 58 F.3d 1063 (5th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996).

[175] 28 C.F.R. Part 36.

to the transportation provisions of Title III have been promulgated by the Department of Transportation.[176]

Telecommunications

Title IV of the ADA amends Title II of the Communications Act of 1934[177] by adding a section providing that the Federal Communications Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing impaired and speech impaired individuals. Any television public service announcement that is produced or funded in whole or part by any agency or instrumentality of the federal government shall include closed captioning of the verbal content of the announcement. The FCC is given enforcement authority with certain exceptions.[178]

Title V

Statutory Provisions

Title V contains an amalgam of provisions, several of which generated considerable controversy during ADA debate. In addition, the ADA Amendments Act of 2008 contained some additions to Title V.

Section 501 concerns the relationship of the ADA to other statutes and bodies of law. Subpart (a) states that "except as otherwise provided in this act, nothing in the act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act ... or the regulations issued by Federal agencies pursuant to such Title." Subpart (b) provides that nothing in the act shall be construed to invalidate or limit the remedies, rights, and procedures of any federal, state, or local law that provides greater or equal protection. Nothing in the act is to be construed to preclude the prohibition of or restrictions on smoking. Subpart (d) provides that the act does not require an individual with a disability to accept an accommodation which that individual chooses not to accept.[179]

Subpart (c) of Section 501 limits the application of the act with respect to the coverage of insurance; however, the subsection may not be used as a subterfuge to evade the purposes of Titles I and III. The exact parameters of insurance coverage under the ADA are somewhat uncertain. As the EEOC has stated: "the interplay between the nondiscrimination principles of the ADA and employer provided health insurance, which is predicated on the ability to make health-related distinctions, is both unique and complex."[180] The Eighth Circuit Court of Appeals in

[176] 49 C.F.R. Parts 27, 37, 38.

[177] 47 U.S.C. §§201 *et seq.*

[178] 47 U.S.C. §255. For an FCC discussion of closed captioning, see http://www.fcc.gov/cgb/consumerfacts/closedcaption.html.

[179] 29 U.S.C. §§790 *et seq.*

[180] EEOC, "Interim Policy Guidance on ADA and Health Insurance," BNA's Americans with Disabilities Act Manual 70:1051 (June 8, 1993). This guidance deals solely with the ADA implications of disability-based health insurance plan distinctions and states that "insurance distinctions that are not based on disability, and that are applied equally to all (continued...)

Henderson v. Bodine Aluminum, Inc. issued a preliminary injunction compelling the plaintiff's employer to pay for chemotherapy that required an autologous bone marrow transplant.[181] The plaintiff was diagnosed with an aggressive form of breast cancer and her oncologist recommended entry into a clinical trial that randomly assigns half of its participants to high dose chemotherapy that necessitates an autologous bone marrow transplant. Because of the possibility that the plaintiff might have the more expensive bone marrow treatment, the employer's health plan refused to precertify the placement noting that the policy covered high dose chemotherapy only for certain types of cancer, not breast cancer. The court concluded that, "if the evidence shows that a given treatment is non-experimental—that is, if it is widespread, safe, and a significant improvement on traditional therapies—and the plan provides the treatment for other conditions directly comparable to the one at issue, the denial of treatment violates the ADA."[182]

The ADA Amendments Act made several additions to Section 501. The act states that the ADA does not alter eligibility standards for benefits under state workers' compensation laws or under state or federal disability benefit programs. P.L. 110-325 also states that nothing in the act alters the provision of Section 302(b)(2)(A)(ii),[183] specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved. The Senate Statement of Managers notes that this provision was added at the request of the higher education community and "is included solely to provide assurances that the bill does not alter current law with regard to the obligations of academic institutions under the ADA, which we believe is already demonstrated in case law on this topic."[184] The Managers' Statement also noted that this provision "is unrelated to the purpose of this legislation and should be given no meaning in interpreting the definition of disability."[185]

The ADA Amendments Act specifically prohibits reverse discrimination claims and states that nothing in the act shall provide the basis for a claim by a person without a disability that he or she was subject to discrimination because of a lack of a disability. The rules of construction provide that a covered entity under Title I, a public entity under Title II, or a person who operates a place of public accommodation under Title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability solely under the "regarded as" prong of the definition.

Section 502 abrogates the Eleventh Amendment state immunity from suit and was discussed previously. Section 503 prohibits retaliation and coercion against an individual who has opposed

---

(...continued)

insured employees, do not discriminate on the basis of disability and so do not violate the ADA."

[181] 70 F.3d 958 (8th Cir. 1995).

[182] See also *Rogers v. Department of Health and Environmental Control*, 174 F.3d 431 (4th Cir. 1999), where the fourth circuit court of appeals held that the ADA does not require employers to offer the same long-term disability insurance benefits for mental and physical disabilities. For a more detailed discussion of the ADA and coverage of mental and physical disabilities in insurance, see Matthew G. Simon, "Not All Illnesses Are Treated Equally - Does a Disability Benefits Plan Violate the ADA by Providing Less Generous Long-Term Benefits for Mentally Disabled Employees than for Physically Disabled Employees?" 8 U. Pa. J. Lab. & Emp. L. 943 (Summer 2006).

[183] 42 U.S.C. §12182(b)(2)(A)(ii).

[184] 153 CONG. REC. S. 8347 (September 11, 2008)(Statement of Managers to Accompany S. 3406) the Americans with Disabilities Act Amendments Act of 2008).

[185] *Id.*

an act or practice made unlawful by the ADA and was amended by the Lilly Ledbetter Fair Pay Act, P.L. 111-2, to allow for increased compensation in cases of discrimination. Section 504 requires the Architectural and Transportation Barriers Compliance Board (ATBCB) to issue guidelines regarding accessibility. Section 505 provides for attorneys' fees in "any action or administrative proceeding" under the act. Section 506, added by the ADA Amendments Act, states that "[t]he authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act, includes the authority to issue regulations implementing the definitions contained in sections 3 and 4." Section 507 provides for technical assistance to help entities covered by the act in understanding their responsibilities. Section 508 provides for a study by the National Council on Disability regarding wilderness designations and wilderness land management practices and "reaffirms" that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires the use of a wheelchair. Section 514 provides that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution ... is encouraged...."[186] Section 515 provides for severability of any provision of the act that is found to be unconstitutional.

The coverage of Congress was a major controversy during the House-Senate conference on the ADA. Although the original language of the ADA did provide for some coverage of the legislative branch, Congress expanded upon this in the Congressional Accountability Act, P.L. 104-1. The major area of expansion was the incorporation of remedies that were analogous to those in the ADA applicable to the private sector.[187]

Buckhannon Board and Care Home, Inc. v. West Virginia and Attorneys' Fees

Section 505 of the ADA provides for attorneys' fees in "any action or administrative proceeding" under the act. This section was the subject of a Supreme Court decision in *Buckhannon Board and Care Home, Inc., v. West Virginia Department of Human Resources*.[188] In *Buckhannon,* the Supreme Court addressed the "catalyst theory" of attorneys' fees which posits that a plaintiff is a prevailing party if the lawsuit brings about a voluntary change in the defendant's conduct. The Court rejected this theory finding that attorneys' fees are only available where there is a judicially sanctioned change in the legal relationship of the parties.

Statutes providing for the award of attorneys' fees allow courts to make the awards to the "prevailing party." The question presented in *Buckhannon* was whether the term "prevailing party" includes a party who did not secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit has brought about a voluntary change in the defendant's conduct. The Court, in an opinion by then Chief Justice Rehnquist, examined the ADA and the Fair Housing Amendments Act (FHAA)[189] and held that the term "prevailing party" cannot be interpreted in this manner, thus rejecting the concept of a "catalyst theory." Four other members of the Court, Justices O'Connor, Scalia, Kennedy, and

[186] 42 U.S.C. §12212.

[187] Congress has also applied the employment and public accommodation provisions of the ADA to the Executive Office of the President. P.L. 104-331 (October 26, 1996).

[188] 532 U.S. 598 (2001).

[189] 42 U.S.C. §3613(c)(2).

Thomas joined with the Chief Justice while Justices Ginsburg, Stevens, Souter and Breyer dissented.

The Court first noted that in the United States parties are ordinarily required to bear their own attorneys' fees but that Congress has authorized the award of attorneys' fees in numerous statutes in addition to the ones at issue in *Buckhannon.* These fee-shifting provisions have been interpreted in the same manner and the Court noted, citing to *Hensley v. Eckerhart,*[190] that it approached the attorneys' fees provisions of the ADA and the FHAA in this manner.

Examining prior Supreme Court cases, Chief Justice Rehnquist found that a party receiving a judgment on the merits would clearly have a basis on which attorneys' fees might be awarded. Similarly, the court found that settlement agreements enforced through a consent decree may serve as the basis for an award of attorneys' fees. The catalyst theory was seen as dissimilar from these examples since "it allows an award where there is no judicially sanctioned change in the legal relationship of the parties."[191] A voluntary change, even if it accomplished what the plaintiff sought, the Court found, "lacks the necessary judicial *imprimatur* on the change."[192]

Legislation Relating to the ADA in the 112th Congress

Changes in the ADA's statutory language to address the issue of vexatious law suits have been proposed since the 106th Congress.[193] Proponents of such legislation have argued that notification requirements would help prevent the filing of suits designed to generate money for plaintiffs and law firms.[194] Those opposed to the legislation have argued that it would undermine enforcement of the ADA and that vexatious suits are best dealt with by state bar disciplinary procedures or by the courts.[195]

On March 2, 2011, Representative Hunter introduced H.R. 881, the ADA Notification Act of 2011. H.R. 881 would add provisions to the remedies and procedures of Title III of the ADA requiring a plaintiff to provide notice of an alleged violation to the defendant by registered mail. If such notice is not provided, the bill would eliminate state or federal court jurisdiction for the action.

---

[190] 461 U.S. 424 (1983).

[191] 532 U.S. 598, 605 (2001).

[192] *Id.*

[193] For a more detailed discussion, see CRS Report RS22296, *The Americans with Disabilities Act: Legislation Concerning Notification Prior to Initiating Legal Action*, by Emily C. Barbour; Carri Becker, "Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?," 17 Hastings Women's L.J. 93 (2006). See also the preceding discussion of judicial decisions under Title III, which have attempted to respond to the issue of vexatious litigants.

[194] See Testimony of the Honorable Mark Foley, hearing on H.R. 3590, The ADA Notification Act, Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000, published at http://www.house.gov/judiciary/fole0518.htm.

[195] See Letter to Honorable Charles Canady, chairman, Subcommittee on the Constitution, House Committee on the Judiciary from Robert Raben, Assistant Attorney General, reprinted at http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0f.htm.

Author Contact Information

Cynthia Brougher
Legislative Attorney
cbrougher@crs.loc.gov, 7-9121

James V. DeBergh
Legislative Attorney
jdebergh@crs.loc.gov, 7-8022

Acknowledgments

This report was initially authored by Nancy Lee Jones.