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Report for Congress

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

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Summary

The Americans with Disabilities Act, ADA, provides broad nondiscrimination protection in employment, public services, public accommodations and services operated by public entities, transportation, and telecommunications for individuals with disabilities. The Supreme Court has decided fifteen ADA cases, including four cases in the 2001-2002 Supreme Court term. This report will summarize the major provisions of the ADA and will discuss selected recent issues, including the Supreme Court cases. It will be updated as developments warrant.

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

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 accommodation and services operated by private entities, transportation, and telecommunications for individuals with disabilities. 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."[1] Enacted on July 26, 1990, the majority of the ADA's provisions took effect in 1992 but the body of law interpreting the ADA is still being created.

The Supreme Court has decided fifteen ADA cases, twelve since 1998.[2] In the 2001-2002 term, the Court decided four ADA cases, *U.S. Airways Inc. v. Barnett, Toyota Motor Manufacturing, Kentucky Inc. v. Williams, Chevron U.S.A., Inc. v. Echazabal* and *Barnes v. Gorman.* All of these cases have narrowed the scope of the ADA. Three cases involved employment issues and all three cases have limited the rights of employees. The Supreme Court has granted certiorari on two cases for the 2002-2003 term: *Medical Board of California v. Hason*[3] and *Clackamas Gastroenterology Associates, P.C. v. Wells.*[4] In *Hason* the Court will address the

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[1] 42 U.S.C. §12102(b)(1).

[2] *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); *Kirkingburg v. Albertson's Inc.*, 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); and *Barnes v. Gorman*, 536 U.S. 181 (2002). The three cases decided in 1998 were *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Pennsylvania Department of Prisons v. Yeskey*, 524 U.S. 206 (1998); and *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998). For a discussion limited to Supreme Court decisions on the ADA see Nancy Lee Jones, "The Americans with Disabilities Act (ADA): Supreme Court Decisions,".CRS Report RS20246.

[3] 279 F.3d 1167 (9th Cir. 2002), *cert.* granted 71 U.S.L.W. 3347 (Nov. 19, 2002).

[4] 271 F.3d 903, 905 (9th Cir. 2001), *cert.* granted, 71 U.S.L.W. 3233 (Oct. 8, 2002). Oral (continued...)

issue of whether the Eleventh Amendment bars suit under title II of the ADA against the California Medical Board for the denial of a medical license due to the applicant's mental illness. This case is the latest in a series of federalism cases and will be closely watched. In *Clackamas Gastroenterology Associates P.C. v. Wells* the Court will determine whether or not to apply the economic reality test to determine if the clinic's physician-shareholders are counted as "employees" for the purpose of determining whether the clinic is a covered entity under the ADA. This case also has implications for other federal civil rights statutes, such as title VII of the Civil Rights Act of 1964, which have similar language.[5]

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.[6] 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.[7]

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.[8] However, there are tax code provisions which may assist certain businesses or individuals.[9]

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[4] (...continued)
argument will be on Tuesday, February 25, 2003.

[5] For a more detailed examination of these cases see Nancy Lee Jones, "The Americans with Disabilities Act (ADA): Pending Supreme Court Decisions 2002-2003" RS21374.

[6] 29 U.S.C. §794.

[7] 42 U.S.C. §12201(a).

[8] 42 U.S.C. §12206.

[9] See Louis Alan Talley,, "Business Tax Provisions that Benefit Persons with Disabilities,"CRS Report RS20555; Louis Alan Talley, "Additional Standard Tax Deduction for the Blind: A Description and Assessment," RS Report RS21006. 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).

Definition of Disability

Statutory Language

The definitions in the ADA, particularly the definition of "disability," are the starting point for an analysis of rights provided by the law. The term "disability," with respect to an individual, is 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."[10] This definition, which has been the subject of numerous cases brought under the ADA including major Supreme Court decisions, is drawn from the definitional section applicable to section 504.[11]

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.[12] 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.[13] 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."[14] 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.[15] 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, kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.[16]

Regulatory Interpretation

The issues involving the definition of "disability" have been among the most controversial under the ADA. The Equal Employment Opportunity Commission

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[10] 42 U.S.C. § 12102(2).

[11] 29 U.S.C. §706(8).

[12] 42 U.S.C. §12210.

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

[14] *Id.*

[15] 42 U.S.C. §12208.

[16] 42 U.S.C. §12211.

(EEOC) has issued regulations discussing the requirements of the definition which it amended following the Supreme Court's decision in *Sutton* and *Murphy.*[17] The EEOC also issued detailed guidance on the definition on March 15, 1995 which was also amended following the Supreme Court's decisions.[18] This guidance states that the following conditions would not constitute impairments: environmental, cultural, and economic disadvantages; age; pregnancy; common personality traits; and normal deviations in height, weight and strength. However, certain aspects of these conditions could give rise to an impairment. For example, complications arising from pregnancy or conditions associated with age, such as hearing loss, could be considered to be disabilities. The guidance also includes the EEOC's interpretation of the third prong of the definition — "regarded as having a disability." This category is seen by EEOC as including individuals who are subjected to discrimination on the basis of genetic information relating to illness, disease or other disorders.[19]

The EEOC issued guidance to its field investigators to help them analyze ADA charges after the Supreme Court's decisions in *Sutton* and *Murphy*. This guidance emphasizes a case by case determination regarding issues of whether an individual has a disability and whether that individual is "qualified." In addition, the EEOC noted that the Supreme Court's interpretation of the ADA in *Bragdon v. Abbott, supra*, indicates that the terms "impairment," "major life activity" and "substantial limitation" are to be broadly interpreted and "the EEOC will continue to give a broad interpretation to these terms."[20]

At the time of the *Sutton* decision, the EEOC's regulations and guidance stated that the determination of whether a condition constitutes an impairment must be made without regard to mitigating measures. Rejecting this EEOC interpretation in *Sutton*, the Supreme Court noted that no agency was given the authority to interpret the term "disability" but that because both parties accepted the regulations as valid "we have no occasion to consider what deference they are due, if any." The Court specifically noted what it considered to be conceptual difficulties with defining major life activities to include work. Similarly, in *Murphy* the Court clearly stated that its use of the EEOC regulations did not indicate that the regulations were valid. This questioning of the regulations and guidance raises issues concerning how the Court would view other agency interpretations such as those indicating that genetic discrimination would be covered under the definition of individual with disability

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[17] 29 C.F.R. §§1630 *et seq.*

[18] [http://www.eeoc.gov/docs/902cm.html]

[19] *EEOC Compliance Manual,* Section 902; *BNA's Americans with Disabilities Act Manual* 70:1131. [http://www.eeoc.gov/docs/902cm.html] The issue of coverage of genetic disorders has been widely discussed. See CRS Report RL30006, *Genetic Information: Legal Issues Relating to Discrimination and Privacy*.

[20] EEOC, "Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified', (July 1999), [http://www.eeoc.gov/docs/field-ada.html]

under the ADA.[21] This may be particularly important with regard to agency interpretations that rely heavily on the ADA's legislative history since the Court in *Sutton* did not consider the legislative history but found that the statutory language was sufficient to support its holding.[22]

Supreme Court Cases

Although *Sutton* and *Murphy* were discussed briefly with regard to the EEOC's regulations, these are landmark decisions and it is critical to examine these decisions and the Supreme Court's other ADA decisions in more depth. 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.[23] 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. Two other cases the Court has decided on the definitional issue involved whether the effects of medication or assistive devices should be taken into consideration in determining whether or not an individual has a disability. The Court in the landmark decisions of *Sutton v. United Airlines, supra,* and *Murphy v. United Parcel Service, Inc, supra,* held the "determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment...."[24] In *Albertsons Inc. v. Kirkingburg, supra,* the Court held unanimously that the ADA does not require that an employer adopt an experimental waiver program regarding certification of an employee and stated that the ADA requires proof that the limitation on a major life activity by the impairment is substantial. Recently in *Toyota Motor Manufacturing v. Williams*[25] the Court examined what was a "substantial" limitation of a major life activity.

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.[26] 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

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[21] EEOC Compliance Manual, Vol. 2, section 902, order 915.002,902-45 (1995).

[22] See also *Toyota Motor Manufacturing v. Williams*,534 U.S. 184 (2002), where the Court also discussed the definition of disability and noted: "The persuasive authority of the EEOC regulations is less clear....Because both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due."

[23] 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*.

[24] *Sutton v. United Airlines.* See also *Murphy v. United Parcel Service*, where the Court held that the determination of whether the petitioner's high blood pressure substantially limits one or more major life activities must be made considering the mitigating measures he employs.

[25] 534 U.S. 184 (2002).

[26] 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed. 540 (1998).

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) 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.[27]

***Sutton v. United Airlines* and *Murphy v. United Parcel Service*.** In *Sutton,* the Supreme Court affirmed the court of appeals decision and rejected the position of the Equal Employment Opportunities Commission (EEOC). The tenth circuit had held that United Airlines did not violate the ADA when it denied jobs to twins who had uncorrected vision of 20/200 and 20/400. Both of the twins were commercial airline pilots for regional commuter airlines and had 20/20 vision with corrective lenses. However, United rejected their applications based on its policy of requiring uncorrected vision of 20/100 or better for its pilots. The tenth circuit noted that the twins' vision was a physical impairment but found that because it was corrected, they were not substantially impaired in the major life activity of seeing. Similarly, in *Murphy* the tenth circuit relied on its ruling in *Sutton* to find that a former truck mechanic with high blood pressure was not an individual with a disability since he experiences no substantial limitations in major life activities while he takes his medication.

There are several significant implications of these decisions. Most importantly, the decisions significantly limit the reach of the definition of individual with disability. The use of mitigating factors, such as eye glasses or medication is relevant to the determination of disability. And as 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." To be substantially limited in the major life activity of working was seen by the majority as being precluded from more than one type of job. The Court also

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[27] 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*.

emphasized that the statement of findings in the ADA that some 43,000,000 Americans have one or more physical or mental disabilities "requires the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities." The proper analysis was described as examining in an individualized manner whether an individual has a disability. Thus individuals who use prosthetic limbs or a wheelchair "may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run." The Court in *Sutton* and *Murphy* also observed that the third prong of the ADA's definition of disability which would include individuals who are "regarded as" having a disability is relevant. The Court found that there are two ways an individual could be "regarded as" having a disability: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non limiting impairment substantially limits one or more major life activities. Since the petitioners in *Sutton* did not make the argument that they were regarded as having a substantially limiting impairment, the Court did not address the issue there. But in *Murphy* this issue was before the Court. It held that the petitioner's high blood pressure did not substantially limit him in employment since (1) he failed to demonstrate that there is a genuine issue of material fact as to whether he is regarded as disabled and (2) petitioner was able to perform a wide array of jobs.

Justices Stevens and Breyer dissented from the majority's opinions in *Sutton* and *Murphy* arguing that "in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction." The dissenters found that the statutory scheme was best interpreted by looking only to the existence of an impairment that substantially limits an individual either currently or in the past since "this reading avoids the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations."

Albertsons, Inc. v. Kirkingburg. *Albertsons* involved a truck driver with monocular vision who alleged a violation of the ADA based on the refusal of his employer to retain him based on a waiver. The truck driver did not meet the general vision standards set by the Department of Transportation for drivers of commercial vehicles although he did qualify for a waiver. The Supreme Court in a unanimous decision held that an employer does not have to participate in an experimental waiver program.

Although the Court did not need to address definitional issues in *Albertsons*, it did so to "correct three missteps the Ninth Circuit made in its discussion of the matter." The Supreme Court found there was no question regarding the fact that the plaintiff had a physical impairment; the issue was whether his monocular vision "substantially limits" his vision. The ninth circuit had answered this question in the affirmative but the Supreme Court disagreed. First, it found that in order to be substantially limiting, a condition must impose a "significant restriction" on a major life activity, not a "difference" as determined by the ninth circuit. Second, in determining whether or not there is a disability, the individual's ability to compensate for the impairment must be taken into consideration. Third, the existence of a disability must be determined on a case-by-case basis.

Toyota Motor Manufacturing of Kentucky v. Williams. The Supreme Court in *Toyota Motor Manufacturing v. Williams*[28] examined whether the plaintiff was an individual with a disability under the first prong of the definition of individual with a disability; that is, whether she had a physical or mental impairment that substantially limits a major life activity. There was no dispute regarding the fact that the plaintiff's carpal tunnel syndrome and tendinitis were physical impairments. The difference of opinion involved whether these impairments *substantially* limited the plaintiff in the major life activity of performing manual tasks. In order to resolve this issue, 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." Similarly, the Court 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,"[29] 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." Significantly, the Court also stated that "[t]he impairment's impact must also be permanent or long-term." The Supreme Court's opinion emphasized the need for an individualized assessment of the effect of the impairment. Justice O'Connor found it insufficient to merely submit evidence of a medical diagnosis of an impairment; rather, the individual must offer evidence that the extent of the impairment in their own situation is substantial.[30]

Generally *Williams* has been characterized as a win for employers since the Court held that the terms "major life activity" and "substantial" were to be interpreted strictly. However, one commentator has predicted that the decision will not be "a clean win for employers" since litigation will now be complicated by disputes over which life activities are affected by the disability.[31]

Other Judicial Decisions

Numerous lower courts have addressed issues involving the definition of disability. These cases have involved such conditions as obesity,[32] cancer,[33]

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[28] 534 U.S. 184 (2002).

[29] Confirmation of the need for strict interpretation was found by the Court in the ADA's statement of findings and purposes where Congress stated that "some 43,000,000 Americans have one or more physical or mental disabilities." [42 U.S.C. §12101(a)(1)] Justice O'Connor observed that "if Congress had intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."

[30] For a more detailed discussion of this decision see CRS Report RS21105, *The Americans with Disabilities Act: Toyota Motor Manufacturing v. Williams*, by Nancy Lee Jones.

[31] Tony Mauro, "Court's ADA Rulings Aren't Winning Kudos for Clarity," New Jersey L. J. (May 6, 2002).

[32] The EEOC's ADA regulations state that absent unusual circumstances, "obesity is not (continued...)

diabetes,[34] and multiple chemical sensitivity.[35] However, given the recent Supreme Court cases on the definition of disability, the precedential value of lower court cases decided prior to the most recent Supreme Court decisions must be carefully examined to determine if the reasoning comports with the Court's interpretation of the statute.

There have been a number of lower court cases post-*Sutton*. One of the most significant issues raised in these cases is whether an individual with a disability is required to take medication or use an assistive device to alleviate his or her condition. In a recent case involving an individual with asthma, the Maryland district court denied the ADA claim and stated: "Since plaintiff's asthma is correctable by medication and since she voluntarily refused the recommended medication, her asthma did not substantially limit her in any major life activity. A plaintiff who does not avail herself of proper treatment is not a 'qualified individual' under the ADA."[36] Other courts have focused on the other aspects of the definition concerning what is a major life activity and when an individual is considered to have a history of a disability or be "regarded as" having a disability.[37]

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[32] (...continued)
considered a disabling impairment," 29 C.F.R. §1630.2(j)(Appendix). See *Andrews v. Ohio,* 104 F.3d 803 (6th Cir. 1997); *Francis v. City of Meriden,* 129 F.3d 281 (2d Cir. 1997). However, several cases have found situations where obesity might be covered. See, e.g., *Cook v. Rhode Island,* 10 F.3d 17 (1st Cir. 1993); *EEOC v. Texas Bus Lines,* 923 F.Supp. 965 (S.D.Tex. 1996).

[33] In most cases, an individual with cancer would most likely be covered by the ADA since the cancer would probably limit a major life activity. But the fifth circuit court of appeals held that a woman who received radiation treatments for breast cancer was not covered since she missed very few days of work and was therefore not limited in a major life activity. *Ellison v. Software Spectrum, Inc.,* 85 F.3d 187 (5th Cir. 1996).

[34] *Lawson v. CSX Transportation Inc.,* 245 F.3d 916 (7th Cir. 2001). The Seventh Circuit held that the plaintiff's diabetes substantially limited the major life activity of eating, even with the corrective measure of taking insulin.

[35] In *Patrick v. Southern Company Services,* 910 F.Supp. 566 (N.D.Ala. 1996), *aff'd* 103 F.3d 149 (11th Cir. 1996), the court found that alleged multiple chemical sensitivity was not a disability under the ADA since it did not substantially limit the plaintiff in the major life activity of working. However, in *Whillock v. Delta Air Lines,* 926 F.Supp. 1555 (N.D.Ga. 1995, *aff'd* 86 F.3d. 1171 (11th Cir. 1996), the court found that multiple chemical sensitivity might be a disability.

[36] *Tangires v. The Johns Hopkins Hospital,* 79 F.Supp.2d 587 (D. Md. 2000), aff'd 230 F.3d 1354 (2000). See also *Spradley v. Custom Campers, Inc.,* 68 F.Supp.2d 1225 (D.Kansas 1999). But see, *Finical v. Collections Unlimited, Inc.,* 65 F.Supp.2d 1032 (D.Ariz. 1999), where the court rejected the employer's argument that *Sutton's* individualized inquiry does not permit an employer to consider the use of corrective devices which are not actually used.

[37] For a more detailed discussion of these decisions see CRS Report RS20432, *The Americans with Disabilities Act: Post Sutton Decisions on Definition of Disability*.

Employment

General Requirements

Title I of the ADA provides that no covered entity shall discriminate against a qualified individual with a disability because of the 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.[38] The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees.[39] 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.

The Supreme Court has granted *certiorari* in *Clackamas Gastroenterology Associates P.C. v. Wells*[40] to determine whether or not to apply the economic reality test to determine if the clinic's physician-shareholders are counted as "employees" for the purpose of determining whether the clinic is a covered entity under the ADA. The Court's decision in *Clackamas* could be significant not only for ADA cases but also for cases brought under title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, since their similar language would most likely be construed 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.[41]

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 over fifteen 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

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[38] 42 U.S.C. §12112(a). Recently two courts of appeal have held that this 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).

[39] 42 U.S.C. §12111(5).

[40] 271 F.3d 903 (9th Cir. 2001), *cert*. granted 71 U.S.L.W. 3233 (Oct. 8, 2002).

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

desires."[42] 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.[43]

"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.[44] "Undue hardship" is defined as "an action requiring significant difficulty or expense."[45] 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[46] which was amended on October 17, 2002 to reflect the Supreme Court's decision in *U.S. Airways v. Barnett.* [47] Although much of the guidance reiterates longstanding EEOC interpretations in a question and answer format, the EEOC also took issue with some judicial interpretations.[48] Notably the EEOC stated that

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[42] 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). In *Fraizier 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 fifteen or twenty 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).

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

[44] 42 U.S.C. § 12111(9).

[45] 42 U.S.C. §12111(10).

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

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

[48] It should be emphasized that the EEOC's guidance does **not** have the force of regulations
(continued...)

- 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[49] and guidance provide that an employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer.[50] However, the seventh circuit in *Vande Zande v. State of Wisconsin Department of Administration*[51] 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."[52]

Application of the Eleventh Amendment: *Garrett v. University of Alabama*

On February 21, 2001, the Supreme Court decided *Garrett v. University of Alabama.*[53] In a 5-4 decision, the Court held that the Eleventh Amendment bars suits to recover monetary damages by state employees under title I of the Americans with Disabilities Act (ADA). Although the ruling is narrowly focused concerning title I of the ADA, it has broad implications regarding federal-state power[54] and

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[48] (...continued)
and courts are not bound to follow the guidance although some courts do defer to agency expertise.

[49] 29 C.F.R. §1630.9.

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

[51] 44 F.3d 538 (7th Cir. 1995).

[52] *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.

[53] For a more detailed discussion of *Garrett* see CRS Report RS20828, *University of Alabama v. Garrett: Federalism Limits on the Americans with Disabilities Act*.

[54] For a detailed discussion of federalism see CRS Report RL30315, *Federalism and the* (continued...)

emphasizes the difficulty of drafting federal legislation under section 5 of the Fourteenth Amendment that will withstand Eleventh Amendment scrutiny.[55] A similar federalism issue is currently before the Court regarding title II of the ADA in *Medical Board of California v. Hason.*

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 recent Supreme Court decisions in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board,*[56] *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank,*[57] and *Kimel v. Florida Board of Regents.*[58] 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.

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[54] (...continued)
Constitution: Limits on Congressional Power.

[55] It should also be observed that the Supreme Court did not address this issue in the cases it has already decided since it was not presented to the Court."We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause....or §5 of the Fourteenth Amendment...." *Pennsylvania Department of Corrections v. Yeskey, supra*. "This case, as it comes to us, presents no constitutional question." *Olmstead v. L.C. , supra.*

[56] 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).

[57] 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).

[58] 528 U.S. 62 (2000).

- 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.[59] It also specifically abrogates state immunity under the Eleventh Amendment.[60] 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* found that they were not.

Garrett involved two consolidated cases brought by separate Alabama employees. One of the employees, Patricia Garrett, had been undergoing treatment for breast cancer when, she alleged, she was transferred to a lesser position after having been told that her supervisor did not like sick people. The second plaintiff, Milton Ash, alleged that the Alabama Department of Human Services did not enforce its non-smoking policy and that, therefore, he was not able to control his asthma. The Eleventh Circuit held that the state was not immune from suits for damages. The Supreme Court reversed.

Writing for the majority, Chief Justice Rehnquist briefly examined the ADA's statutory language and the general principles of the Eleventh Amendment immunity. He observed that the first step in applying these principles was to identify the scope of the constitutional right at issue, in other words, to identify constitutional rights that individuals with disabilities have to be free from discrimination. Discussing *Cleburne v. Cleburne Living Center*,[61] Chief Justice Rehnquist emphasized that discrimination against individuals with disabilities is entitled to only "minimum 'rational-basis' review" and stated: "Thus, the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hard headedly – and perhaps hardheartedly – hold to job qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[62]

After examining the constitutional rights of individuals with disabilities, the majority opinion in *Garrett* examined whether Congress had identified a history and pattern of unconstitutional employment discrimination by the states against individuals with disabilities. Chief Justice Rehnquist observed that the authority of

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[59] 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).

[60] 42 U.S.C. §12202.

[61] 473 U.S. 432 (1985). In *Cleburne*, the Supreme Court applied the Fourteenth Amendment to individuals with mental retardation and found that, although such individuals were not part of a suspect class, a zoning ordinance which excluded group homes from certain locations violated the Fourteenth Amendment.

[62] Slip op. at 9-10.

Congress under section 5 of the Fourteenth Amendment "is appropriately exercised only in response to state transgressions."[63] He found that the legislative history of the ADA did not identify such a pattern. Although the record was replete with examples of discrimination, Chief Justice Rehnquist noted that most of these examples were drawn from units of local government and not the states and that "the Eleventh Amendment does not extend its immunity to units of local government."[64]

The *Garrett* majority observed that even if a pattern of unconstitutional discrimination by states was found, issues relating to whether there was a "congruence and proportionality" between the injury to be prevented and the means adopted would raise concerns. Chief Justice Rehnquist observed that "it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities" but that the ADA requires that existing facilities be readily accessible to and usable by individuals with disabilities.[65] The ADA's accommodation requirements were seen as "far exceed(ing) what is constitutionally required."[66] The ADA's requirements forbidding standards, criteria, or methods of administration that disparately impact individuals with disabilities were also seen as inconsistent with the requirements for legislation under section 5 of the Fourteenth Amendment.

In conclusion, the majority opinion stated that "Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here...."[67] However, after reaching this holding, the *Garrett* majority went on to note that it does not mean that individuals with disabilities have no federal recourse. The opinion was limited to the recovery of monetary damages and the standards of title I of the ADA were seen as still applicable to the states. In addition, the Court noted that the federal government could enforce those rights in actions for monetary damages and that state law would offer some means of redress.

In a concurring opinion, Justices Kennedy and O'Connor, emphasized the limited nature of the opinion stating that "what is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government but by private

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[63] Slip op. at 10.

[64] Slip op. at 11.

[65] Slip op. at 14.

[66] Slip op. at 14.

[67] Slip op. at 16.

persons seeking to collect moneys from the state treasury without the consent of the State."[68]

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, strongly disagreed with the majority's opinion and stated that Congress could have reasonably concluded that the title I remedies of the ADA were appropriate legislation under the Fourteenth Amendment. The emphasis in the majority opinion on the limited legislative history was described as ignoring the "powerful evidence of discriminatory treatment throughout society in general" which "implicates state governments as well, for state agencies form part of that same larger society."[69] The rules the majority used to find the legislative record inadequate were seen as flawed, using standards more appropriately applied to judges than to Congress. In the view of the dissenters, Congress has broad authority to remedy violations of the Fourteenth Amendment. "There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its §5 authority, to adopt rules or presumptions that reflect a court's institutional limitations. Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy."[70]

University of Alabama v. Garrett is a major decision, further emphasizing the Court's federalism theories and raising separation of powers issues as well.[71] Although the majority does not rule out all legislation enacted pursuant to §5 of the Fourteenth Amendment, it has made the enactment of such legislation significantly less likely to withstand Eleventh Amendment scrutiny. In addition, the Court's comments on disparate impact discrimination could signal a challenge to other uses of this approach and some commentators have stated this could have implications for other statutes, including title VII of the Civil Rights Act, which prohibits racial discrimination.[72] More specifically, with regard to the ADA, the majority took pains to describe the limited nature of the holding. It is limited to title I of the ADA, deals only with monetary damages and leaves open other avenues of relief such as enforcement by the Equal Employment Opportunities Commission and state laws. However, the absence of monetary damages does make individual suits against states much less likely and has been described as a significant blow to ADA enforcement.

Several courts of appeals have examined the ADA and state sovereign immunity issues subsequent to the Supreme Court's decision in *Garrett.* The eighth circuit court of appeals in *Gibson v. Arkansas Department of Correction*,[73] discussed *Garrett's*, language on the limited nature of its holding, and held that state officials may be sued for prospective relief under title I of the ADA. Although the state had

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[68] Concurring op. at 3.

[69] Dissenting op. at 3.

[70] Dissenting op. at 9.

[71] Linda Greenhouse, "The High Court's Target: Congress," *The New York Times* wk 3 (Feb 25, 2001.)

[72] *Id.*

[73] 265 F.3d 718 (8th Cir. 2001).

argued that the *Garrett* discussion was mere *dicta*, the court of appeals disagreed stating: "there is no reason to think that Congress intended to limit the availability of prospective relief against states who continued to discriminate against the disabled."[74] In *Reickenbacker v. Foster*[75] the fifth circuit held that the state department of corrections was entitled to sovereign immunity with respect to mentally ill prisoners' ADA claims. The ninth circuit in *Demshki v. Monteith*[76] held that the ruling in *Garrett* was applicable to a claim brought under title V of the ADA regarding retaliation since the claim involved an employment issue. In addition to judicial decisions, at least one state has enacted legislation waiving its immunity for ADA purposes.[77]

The Supreme Court continues to examine federalism issues, including the question of the application of the Eleventh Amendment to title II of the ADA. In the 2001-2002 term, the Court held in *Federal Maritime Commission v. South Carolina State Ports Authority*[78] that the states have Eleventh Amendment immunity from private lawsuits adjudicated by federal administrative agencies. The Supreme Court has granted certiorari in *Nevada Department of Human Resources v. Hibbs*, to decide whether state employees can sue their agencies under the Family and Medical Leave Act (FMLA).[79] The Court will also look at title II of the ADA in *Medical Board of California v. Hason*.[80]

Hason involves a doctor who was denied a medical license by the medical board of California because he had been treated for depression and drug dependency. He sued under title II of the ADA which prohibits discrimination against individuals with disabilities by states or localities. The state argued that the Eleventh Amendment barred suits against the state medical board under the ADA but the ninth circuit court of appeals rejected this argument, finding that the state was subject to suit under the ADA. The Supreme Court granted *certiorari* to address the Eleventh Amendment issue. As was noted above, in *Garrett* the record in the ADA regarding employment discrimination was found to be insufficient to abrogate Eleventh Amendment immunity. However, Chief Justice Rehnquist writing for the majority

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[74] See also *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001), where the court held that the Eleventh Amendment did not bar a claim by a securities agent with bipolar affective disorder for injunctive relief regarding registration as a securities agent.

[75] 274 F.3d 974 (5th Cir. 2001).

[76] 255 F.3d 986 (9th Cir. 2001).

[77] Chapter 159, S.F. No. 1614 (Minnesota Sessions Laws, May 22, 2001). "An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Americans with Disabilities Act of 1990...may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act." This Minnesota law also waived immunity regarding the Age Discrimination in Employment Act, the Fair Labor Standards Act and the Family and Medical Leave Act.

[78] 535 U.S. 743 (2002).

[79] 273 F.3d 844 (9th Cir. 2001); cert. granted, 122 S.Ct. 2618; 153 L.Ed.2d 802 (March 19, 2002), argued January 15, 2003.

[80] 279 F.3d 1167 (9th Cir. 2002), *cert.* granted 71 U.S.L.W. 3347 (Nov. 19, 2002).

in *Garrett* contrasted the ADA's legislative history on employment discrimination with that on state conduct that violates title II, noting that the evidence regarding employment was sparse compared with the evidence of state conduct. The decision in *Hason* may well be critical not only for the interpretation of the ADA but also for the development of constitutional doctrine on federalism.[81]

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 although it is discussed separately above.

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 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.

"Qualified" Individual with a Disability. In the *Albertsons* decision discussed in part previously, 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

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[81] For a more detailed discussion of *Hason* see Nancy Lee Jones, "The Americans with Disabilities Act (ADA): Pending Supreme Court Divisions 2002-2003," CRS Rep. RS21374.

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*,[82] 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."[83] 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[84] 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 chemicals in the workplace.[85] 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.[86] 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.*,[87] 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."

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[82] 536 U.S. 73 (2002).

[83] 42 U.S.C. §12113(a).

[84] 42 U.S.C. §12113(b).

[85] 226 F.3d 1063 (9th Cir. 2000).

[86] 29 C.F.R. §1630.15(b)(2).

[87] 499 U.S. 187 (1991).

Echazabal has been hailed by employers as "a major victory for the business community."[88] However, Andrew Imparato, the President of the American Association of People with Disabilities, stated that "The United States Supreme Court today once again demonstrated its fundamental hostility to disability rights in the workplace....Today's decision invites paternalism and represents a major step backward for the more than 35 million working age Americans with disabilities."[89]

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.[90]

Reasonable Accommodations and Seniority Systems. The Supreme Court in *U.S. Airways v. Barnett*[91] 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 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

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[88] Linda Greenhouse, "Employers, in 9-0 Ruling by Justices, Extend Winning Streak in Disabilities Act Cases," NYT A-16 (June 11, 2002).

[89] "Supreme Court Hostile to Disability Rights in the Workplace" [http://www.aapd-dc.org/docs/disabilityinworkplace.html].

[90] For more information, see CRS Report RL30008, *Labor and Mandatory Arbitration Agreements: Background Discussion*.

[91] 535 U.S. 391 (2002).

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.

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.[92] 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.[93] Once an offer is 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.[94] However, there is uncertainty concerning whether *predictive* medical testing is permissible. Some employers have tested new employees for the human immunodeficiency virus (HIV), for sickle cell traits, and for genetic markers that indicate an individual may have a higher than average susceptibility to cancer or Huntington's disease.

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.[95]

Defenses to a Charge of Discrimination

The ADA specifically lists some defenses to a charge of discrimination, including (1) that the alleged application of qualification standards has been shown to be job related and consistent with business necessity and such performance cannot

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[92] 42 U.S.C. §12112.

[93] EEOC, "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," Oct. 10, 1995.

[94] *Id.*

[95] 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].

be accomplished by reasonable accommodation, (2) that the term "qualification standards" can include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,[96] and (3) that religious entities may give a preference in employment to individuals of a particular religion to perform work connected with carrying on the entities' activities.[97] In addition, religious entities may require that all applicants and employees conform to the religious tenets of the organization. The Secretary of Health and Human Services has, pursuant to a statutory requirement,[98] listed infectious diseases transmitted through the handling of food; and if the risk cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign an individual with such a disease to a job involving food handling.[99]

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.[100] 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.[101]

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."[102] Title I also provides that a covered entity may prohibit the illegal use of drugs and the use of alcohol in the workplace.[103] Similarly, employers may hold all employees, regardless of whether or not they have a disability, to the same performance and

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[96] The EEOC in its regulations states 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. 29 C.F.R. § 1630.2(r).

[97] 42 U.S.C. § 12113.

[98] *Id.*

[99] 62 F.R. 49518 (Sept. 22, 1997).

[100] 29 C.F.R. Appendix §1630.3.

[101] See e.g., *Shafer v. Preston Memorial Hospital Corp.*, 107 F.3d 274 (4th Cir. 1997)(individual is a current user if he or she has illegally used drugs "in a periodic fashion during the weeks and months prior to discharge.")

[102] 29 C.F.R. Appendix §1630.3.

[103] 42 U.S.C. §12114(c); 29 C.F.R. §1630.16(b)(4).

conduct standards.[104] 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.[105]

Remedies

The remedies and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964,[106] 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.[107] Similarly, there is also a "good faith" exception to the award of damages with regard to reasonable accommodation.

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.*[108] 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, it is likely that the holding in *Kolstad* would be applicable to ADA employment cases as well.[109]

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[104] 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").

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

[106] 42 U.S.C. §§2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9.

[107] 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.

[108] 527 U.S. 526 (1999).

[109] 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.

In *Equal Employment Opportunity Commission v. Wal-mart Stores, Inc.*,[110] 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.

In two other cases courts drew on title VII jurisprudence to hold that the ADA allows suits for workplace harassment. In *Flowers v. Southern Regional Physician Services,*[111] the plaintiff claimed that her workplace environment and her performance reviews changed dramatically when her supervisor became aware of the plaintiff's HIV infection. She was eventually fired from her job. Although there was no precedent among the courts of appeals, the fifth circuit found that "it is evident, after a review of the ADA's language, purpose, and remedial framework, that Congress's intent in enacting the ADA was, *inter alia*, to eradicate disability-based harassment in the workplace." The Fourth Circuit in *Fox v. General Motors Corporation*[112] ruled similarly. The plaintiff in *Fox* had been on disability leave and when he returned he was placed in light duty by his doctor. He was taunted and insulted by his coworkers and supervisors and ordered to do work beyond his physical capability. In analyzing whether the ADA permits workplace harassment suits, the fourth circuit noted the parallels between the ADA and Title VII and held that "for these reasons, we have little difficulty in concluding that the ADA, like Title VII, creates a cause of action for hostile work environment harassment."

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[110] 187 F.3d 1241 (10th Cir. 1999).

[111] 247 F.3d 229 (5th Cir. 2001).

[112] 247 F.3d 169 (4th Cir. 2001).

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 or be subjected to discrimination by any such entity.[113] "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.[114]

The Department of Justice regulations for title II 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.[115] 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.[116]

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.

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

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[113] 42 U.S.C. §§12131-12133.

[114] 29 U.S.C. §794.

[115] 28 C.F.R. §35.150.

[116] *Id.*

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.[117]

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.[118] "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 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.[119]

The Supreme Court has granted certiorari in another title II case, *Medical Board of California v. Hason.* In *Hason*, which was discussed in more depth in the Title I section on the application of the Eleventh Amendment, the Court will address the issue of whether the Eleventh Amendment bars suit under title II of the ADA against the California Medical Board for the denial of a medical license due to the applicant's mental illness.[120]

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[117] 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).

[118] *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 discussion of these policy issues and legislation see Carol O'Shaughnessy and Bob Lyke, "Long Term Care: 107th Congress Legislation," CRS Report RS20992.

[119] For a more detailed discussion of *Olmstead* see Melinda De Atley and Nancy Lee Jones, "*Olmstead v. L.C.:* Implications and Subsequent Judicial, Administrative, and Legislative Actions," CRS Report RS20588.

[120] For a more detailed discussion of the Eleventh Amendment and the ADA see the preceding discussion of *Garrett v. University of Alabama* under the title I employment section.

Other Title II Cases

In *Bartlett v. New York State Board of Law Examiners*,[121] the second circuit court of appeals held that an individual's dyslexia is a learning disability and that the New York state bar examiners were required under the ADA to make reasonable accommodations in administering the bar exam.

In another title II case, a Hawaii regulation requiring the quarantine of all dogs, including guide dogs for visually impaired individuals, was found to violate title II.[122] Other title II cases have involved whether curb ramps are required,[123] the application of title II to a city ordinance allowing open burning,[124] and the application of the ADA to a city's zoning ordinances.[125]

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.[126] 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 commuter

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[121] 156 F.3d 321 (2d Cir. 1998), vacated and remanded for further consideration in light of *Sutton, Murphy and Albertsons*, 527 U.S. 1031 (1999). The second circuit held that plaintiff may be disabled, 226 F.3d 69 (2d Cir. 2000), petition for certiorari filed, March 21, 2001.

[122] *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."

[123] In *Kinney v. Yerusalim*, 812 F.Supp. 547 (E.D. Pa. 1993), *aff'd* 9 F.3d 1067 (3d Cir. 1993), *cert. den.*, 511 U.S. 1033, 128 L.Ed.2d 196, 114 S.Ct. 1545 (1994), the court found that street repair projects must include curb ramps for individuals with disabilities. See also 28 C.F.R. §35.151(e)(1), where the Department of Justice detailed the requirements for curb ramps. See also *Barden v. Sacramento*,292 F.3d 1073 (9th Cir. 2002), petition for *certiorari* filed Nov. 25, 2002, No. 02-815. It should also be noted that New York City has begun implementation of a settlement agreement which specifies the installation of curb ramps. See "New York Agree to Spend $218 Million to Build Curb Ramps," 11 BNA's Americans with Disabilities Act Manual 91 (Dec. 19, 2002).

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

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

[126] 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).

bus service.[127] Rail systems must have at least one car per train that is accessible to individuals with disabilities.[128]

Draft guidelines have been published by the Architectural and Transportation Barriers Compliance Board (Access Board) regarding the accessibility of public rights-of-way.[129] The Access Board is currently preparing a proposed rule which is expected to be available for public comment in the spring of 2003.[130]

Remedies

The enforcement remedies of section 505 of the Rehabilitation Act of 1973, 29 U.S.C. §794a, are incorporated by reference.[131] 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,[132] and the Secretary of Transportation has issued regulations regarding transportation.[133]

***Barnes v. Gorman*.** The Supreme Court in *Barnes v. Gorman*[134] held in a unanimous decision that punitive damages may not be awarded under section 202[135] of the ADA and section 504 of the Rehabilitation Act of 1973.[136] 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

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[127] 42 U.S.C. §12143.

[128] 42 U.S.C. §12162.

[129] "Draft Guidelines for Accessible Public Rights-of-Way," [http://www.access-board.gov/rowdraft.htm] (June 17, 2002).

[130] "The ADA and Transportation: Improving Safety and Access on Public Rights-of-Way," [http://www.tfhrc.gov/focus/nov02/06.htm] (Nov. 2002).

[131] 42 U.S.C. §12133.

[132] 28 C.F.R. Part 35.

[133] 49 C.F.R. Parts 27, 37, 38.

[134] 536 U.S. 181 (2002).

[135] 42 U.S.C. §12132. Section 203, 42 U.S.C. §12133, contains the enforcement provisions.

[136] 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,

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 cause of action brought under title VI of the Civil Rights Act of 1964."[137] 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[138] 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."[139] 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

Statutory 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.[140] 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.[141] 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."[142] "Readily achievable" is defined as meaning "easily accomplishable

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[137] 42 U.S.C. §2000d *et seq.*

[138] U.S. Const., Art. I §8, cl.1.

[139] *Pennhurst State School and Hospital v. Halderman,* 4512 U.S. 1, 17 (1981).

[140] 42 U.S.C. §12182.

[141] 42 U.S.C. §12181.

[142] 42 U.S.C. §12182(b)(2)(A)(iv).

and able to be carried out without much difficulty or expense."[143] 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.[144] An undue burden is defined as an action involving "significant difficulty or expense."[145]

Title III contains a specific exemption for religious entities.[146] This applies when an entity is controlled by a religious entity. For example, a preschool that is run by a religious entity would 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.[147] In interpreting this provision,[148] 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.[149]

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.[150]

Supreme Court Cases

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. This issue was discussed by the Supreme Court in *Bragdon v. Abbott, supra*, where the

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143 42 U.S.C. §12181.

144 42 U.S.C. §12182(b)(2)(A).

145 28 C.F.R. §36.104.

146 42 U.S.C. §12187.

147 42 U.S.C. §2000a-3(a).

148 42 U.S.C. 12187.

149 Department of Justice, "ADA Title III Technical Assistance Manual" III-1.6000.

150 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.

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.[151]

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*,[152] 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.[153] The ninth circuit had ruled that the use of the cart was permissible since it did not "fundamentally alter" the nature of the competition.[154]

Title III of the ADA defines the term "public accommodation," specifically listing golf courses.[155] 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.**"[156]

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

[152] 167 F.3d 873 (4th Cir. 1999), *cert. denied*, 528 U.S. 813 (1999).

[153] 532 U.S. 661 (2001).

[154] 204 F.3d 994 (9th Cir. 2000).

[155] 42 U.S.C. §12181(7).

[156] 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

(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."

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[156] (...continued)
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 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).

ADA and the Internet

Title III prohibits discrimination 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.[157] The statutory language, which was enacted in 1990 prior to widespread internet use, does not specifically cover internet sites. The question is then whether the statute can be interpreted to include internet sites. One of the relevant issues in resolving this novel problem is whether a place of public accommodation is limited to actual physical structures.

The courts have split on this issue with the first circuit in *Carparts Distribution Center v. Automotive Wholesalers Association of New England Inc.* finding that public accommodations are not limited to actual physical structures. The court reasoned that "to exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA."[158] The seventh circuit in *Doe v. Mutual of Omaha Insurance Company*[159] agreed with the first circuit. In *Doe* Judge Posner discussed the nondiscrimination requirements of title III in the context of a case involving a cap on insurance policies for AIDS and AIDS related complications and found that "The core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space)...that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do."[160] The court reasoned that "the owner or operator of, say, a camera store can neither bar the door to the disabled nor let them in but then refuse to sell its cameras to them on the same terms as to other customers."[161] However, Judge Posner found no violation of the ADA in this case and concluded that "section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and nondisabled...."[162]

The second circuit joined the first and seventh circuits in finding that the ADA is not limited to physical access. The court in *Pallozzi v. Allstate Life Insurance Co.*,[163] stated that "Title III's mandate that the disabled be accorded 'full and equal enjoyment of goods, [and] services....of any place of public accommodation,' suggests to us that the statute was meant to guarantee them more than mere physical access."

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[157] 42 U.S.C. §12182.

[158] *Carparts Distribution Center, Inc. v. Automotive Wholesalers' Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994).

[159] 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 528 U.S. 1106 (2000).

[160] *Id.* at 559 (emphasis added.)

[161] *Id.*

[162] *Id.* at 563.

[163] 198 F.3d 28 (2d Cir. 1999).

On the other hand, the third, sixth, and ninth circuits apparently restrict the concept of public accommodations to physical places. In *Stoutenborough v. National Football League, Inc.*,[164] the sixth circuit dealt with a case brought by an association of individuals with hearing impairments who filed suit against the National Football League (NFL) and several television stations under title III alleging that the NFL's blackout rule discriminated against them since they had no other way of accessing football games when live telecasts are prohibited. The sixth circuit rejected this allegation holding that the prohibitions of title III are restricted to places of public accommodations. Similarly, in *Parker v. Metropolitan Life Insurance Co.*[165] the sixth circuit held that the ADA's nondiscrimination prohibition relating to public accommodations did not prohibit an employer from providing employees a disability plan that provided longer benefits for employees disabled by physical illness than those disabled by mental illness. In arriving at this holding, the sixth circuit found that "a benefit plan offered by an employer is not a good offered by a place of public accommodation....A public accommodation is a physical place."[166]

Recently the precise issue of the ADA's application to the internet arose in *Access Now, Inc., v. Southwest Airlines, Co.*,[167] where the court held that Southwest Airlines website was not a "place of public accommodation" and therefore was not covered by the ADA. The district court examined the ADA's statutory language, noting that all of the listed categories were concrete places, and that to expand the ADA to cover "virtual" spaces would be to create new rights.

Previously, on November 2, 1999, the National Federation of the Blind (NFB) filed a complaint against America Online (AOL) in federal district court alleging that AOL violated title III of the ADA.[168] NFB and other blind plaintiffs stated that they could only independently use computers by concurrently running screen access software programs for the blind that convert visual information into synthesized speech or braille. They alleged that AOL had designed its service so that it is incompatible with screen access software programs for the blind, failing "to remove communications barriers presented by its designs thus denying the blind independent

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[164] 59 F.3d 580 (6th Cir. 1995), *cert. denied,* 516 U.S. 1028 (1995).

[165] 121 F.3d 1006 (6th Cir. 1997), *cert. denied,* 522 U.S. 1084 (1998).

[166] *Id.* At 1010. See also, *Lenox v. Healthwise of Kentucky,* 149 F.3d 453 (6th Cir. 1999).

[167] 227 F.Supp.2d 1312 (S.D. Fla. 2002).

[168] It should be noted that section 508 of the Rehabilitation Act of 1973, 29 U.S.C. §794(d), as amended by P.L. 105-220, requires that the electronic and information technology used by federal agencies be accessible to individuals with disabilities, including employees and members of the public. On December 21, 2000 the Architectural and Transportation Barriers Compliance Board (Access Board) issued standards providing technical criteria specific to various types of technologies and performance-based requirements.65 Fed. Reg. 80500 (Dec. 21, 2000). To be published at 36 C.F.R. Part 1194. On January 22, 2001, the Federal Acquisition Regulation (FAR) Council published a proposed rule to implement section 508. [http://www.access-board.gov/sec508/FARnotice.htm] To be published at 48 C.F.R. Parts 2,7, 10, 11, 12, and 39.

access to this service, in violation of Title III of the ADA, 42 U.S.C. §12181, et seq."[169] The case was settled on July 26, 2000.[170]

The question of ADA coverage of internet sites will undoubtedly continue to be a closely watched issue.[171] Access Now, the group that filed suit against Southwestern, currently has a similar suit against American Airlines pending. 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.[172]

Other Judicial Decisions

In *Ford v. Schering-Plough Corporation,*[173] 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."[174] 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.[175]

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169 *National Federation of the Blind v. America Online,* Complaint, [http://www.nfb.org/bm/bm99/brlm9912.htm] (Nov. 2, 1999).

170 The settlement agreement can be found at the National Federation of the Blind website, [http://www.nfb.org]

171 For a more detailed discussion of the issue see Adam M. Schloss, "Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?" 35 Columbia J. of Law and Social Problems 35 (2001); Matthew A. Stowe, "Interpreting Place of Public Accommodation Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications," 50 Duke L.J. 297 (2000); Jonathan Bick, "Americans with Disabilities Act and the Internet," 10 Alb. L.J. Sci. & Tech. 205 (2000).

172 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.

173 145 F.3d 601(3d Cir. 1998), *cert. denied,* 525 U.S. 1093 (1999).

174 *Id.* At 612.

175 58 F.3d 1063 (5th Cir. 1995), *cert. den.,* 516 U.S. 1045 (1996).

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[176] and regulations relating to the transportation provisions of title III have been promulgated by the Department of Transportation.[177]

Telecommunications

Title IV of the ADA amends title II of the Communications Act of 1934[178] 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.[179]

Title V

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*

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[176] 28 C.F.R. Part 36.

[177] 49 C.F.R. Parts 27, 37, 38.

[178] 47 U.S.C. §§201 *et seq.*

[179] 47 U.S.C. §255.

Department of Human Resources.[180] 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 Chief Justice Rehnquist, examined the ADA and the Fair Housing Amendments Act (FHAA)[181] 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 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,*[182] 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."[183] A voluntary change, even if it accomplished what the plaintiff sought, the Court found, "lacks the necessary judicial *imprimatur* on the change."[184]

Other Title V Provisions

Title V contains an amalgam of provisions in addition to the provision on attorneys' fees discussed above several of which generated considerable controversy during ADA debate. Section 501 concerns the relationship of the ADA to other statutes and bodies of law. Subpart (a) states that "except as otherwise provided in

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[180] 532 U.S. 598 (2001).

[181] 42 U.S.C. §3613(c)(2).

[182] 461 U.S. 424 (1983).

[183] 532 U.S. 598, 605 (2001).

[184] *Id.*

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.[185]

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."[186] The eighth circuit court of appeals in *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.[187] 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."[188]

Section 502 abrogates the Eleventh Amendment state immunity from suit and was discussed in the section on public services. Section 503 prohibits retaliation and coercion against an individual who has opposed an act or practice made unlawful by the ADA. Section 504 requires the Architectural and Transportation Barriers Compliance Board (ATBCB) to issue guidelines regarding accessibility. Section 506 provides for technical assistance to help entities covered by the Act in understanding

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185 29 U.S.C. §§790 *et seq.*

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

187 70 F.3d 958 (8th Cir. 1995).

188 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.

their responsibilities. Section 507 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 513 provides that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution ... is encouraged...."[189] Section 514 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.[190]

Legislation Relating to the ADA

Although the ADA has not been the subject of major amendments since its enactment in 1990 several bills have been introduced. Among the most discussed are the bills which would require notification of an alleged violation of the ADA.[191]

The two ADA Notification Acts in the 107th Congress, H.R. 914[192] and S. 792,[193] like their predecessors H.R. 3590[194] and S. 3122,[195] 106th Cong., would add provisions to the remedies and procedures of title III of the ADA to require a plaintiff to provide notice of an alleged violation to the defendant.[196] This notice may be provided by registered mail or in person and shall contain the specific facts regarding the alleged violation including the identification of the location at which the violation occurred, and the date on which the violation occurred. The notice also shall inform the defendant that civil action may not be commenced until the expiration of a ninety day period. A court does not have jurisdiction unless this notice is provided, at least

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189 42 U.S.C. §12212.

190 For a more detailed discussion of the application of the ADA to Congress see CRS Report 95-557, *Congressional Accountability Act of 1995*. 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).

191 For a more detailed discussion of this legislation see Nancy Lee Jones, "Legislation in the 107th Congress Requiring Notification Prior to Certain Legal Actions Under the Americans with Disabilities Act," CRS Rep. RS21187.

192 H.R. 914 was introduced by Rep. Foley.

193 S. 792 was introduced by Senator Inouye.

194 H.R. 3590 was introduced by Rep. Foley.

195 S. 3122 was introduced by Senator Hutchinson.

196 H.R. 914, 107th Cong., H.R. 3590, 106th Cong., and S. 3122, 106th Cong. are identical. S. 792 contains some minor differences.

ninety days have passed, and the complaint states that the defendant has not corrected the alleged violation. If these requirements are not met when a civil action is filed, the court shall impose an appropriate sanction on the attorneys involved.[197] If the criteria are subsequently met and the action proceeds, the court may not award attorneys' fees. There was no committee action on the ADA notification legislation in the 107th Congress. Hearings were held by the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 3590 on May 18, 2000.[198]

Other bills were also introduced in the 107th Congress to amend the ADA. In the House these included H.R. 820 which would have amended various civil rights acts including the ADA to require the EEOC to mediate employee claims arising under the acts; H.R. 915, which would have amended the Internal Revenue Code to provide a tax credit for modifications of intercity buses; H.R. 1489, which would have amended certain civil rights laws including the ADA to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination. In the Senate the following bills were introduced to amend the ADA: S. 33, which would have exclude prisoners from the coverage of title II; S. 163 which would have amended certain civil rights laws including the ADA to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination; and S. 1192 which would have amended the Internal Revenue Code to provide a tax credit for modifications of intercity buses.

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[197] S. 792 provides for "an appropriate sanction on the attorney for the plaintiff."

[198] Hearing on H.R. 3590, the ADA Notification Act, Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. [http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0f.htm]