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A collaborative program between the
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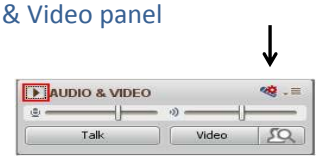

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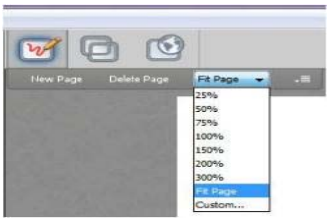

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Top ADA Cases of 2015

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

Valuable assistance provided by:
Allen Thomas & Jordan Silver, Volunteer Attorneys

January 20, 2016

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Information, Guidance and Training on the Americans with Disabilities Act

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Outline of Today's Webinar

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

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Definition of Disability

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ADAAA: Definition of Disability
Interacting with Others

Jacobs v. N.C. Administrative Office of the Courts
780 F.3d 562 (4th Cir. 2015)

- Employee with social anxiety disorder brought ADA lawsuit
- **District court:** Found for employer – not disabled
- **4th Cir:** Found for employee – reversed/remanded
- **Impairment:** Expert diagnosed social anxiety disorder
  - Defense expert reviewed records and was equivocal on diagnosis
- **Major life activity:** Interacting with others
  - Rejected employer's argument that EEOC erred when including interacting with others as a major life activity
  - Advances broad remedial purpose of the ADAAA

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Definition of Disability

- **Substantial limitation:** Rejected employer's argument to contrary
  - "A person need not live as a hermit … to be substantially limited"
  - People will avoid social situations or endure with intense anxiety
  - Jury may conclude that employee was substantially limited even if debilitating anxiety was specific to performance situation (answering questions at the front counter)
- **Mitigating measure:** Facebook as a mitigating measure:
  - Employee used Facebook as a form of exposure therapy in attempt to overcome her anxiety
  - Court not permitted to consider Facebook use in determining whether employee had a disability

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ADA Amendments Act
Regarded As and Episodic Conditions

Courts continue to apply broadened definition of disability

***Burton v. Freescale Semiconductor*, 798 F.3d 222 (5th Cir. 2015)**

- "Regarded as" – only need to show that employer perceived employee to have an impairment
- Here, employer had knowledge of impairment
  - Employee reported injury to personnel department; disclosed having palpitations; emails from supervisors about employee's need "to sit down for a bit," "chest pains," and trouble breathing

***Allen v. Baltimore Cty., Md.*, 91 F.Supp.3d 722 (D. Md. 2015)**

- Employee "plainly" had a disability—sarcoidosis
- During flare ups, he had substantial limitations in walking, standing

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Title I: Employment

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Qualified/Reasonable Accommodation of Job Restructuring

Jacobs v. N.C. Administrative Office of the Courts

780 F.3d 562 (4th Cir. 2015)

- Employee with social anxiety disorder worked as an office assistant – promoted to deputy clerk
- 4 of 30 clerks provided customer service at front counter
- Other clerks performed filing/record-keeping tasks
- Employee worked 4 days/week at the front; 1 day microfilming
- Experienced panic, stress and extreme nervousness at front desk
- Panicked when she did not know the answer to a question
- Requested job restructuring – no front desk
- Employer said it could not respond until one particular employee returned in 3 weeks – then, without discussing the accommodation request, fired the employee

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Qualified/Reasonable Accommodation of Job Restructuring

Issue: Was working front counter an essential function? If not, was it a reasonable accommodation to restructure the employee's job?

- Job description: Providing customer service is one of many duties
- 30 deputy clerks
  - Only 4 regularly worked front counter (fewer than 15%)
  - Some deputy clerks never performed this task
  - Many clerks were available to perform this function
- Although new clerks typically started at front counter, some new clerks started in filing first
- Request did not increase others' workload

4th Cir: A reasonable jury could find job restructuring to be a reasonable accommodation

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Reasonable Accommodation/Qualified Job Restructuring

Sullivan v. Spee-Dee Delivery Service, Inc.

2015 WL 5749814 (W.D. Wis. Sept. 30, 2015)

- Driver with epilepsy unable to drive commercial motor vehicles per federal law was reassigned to part-time position with lower pay, fewer hours and no benefits
- **Issue:** Is driving a commercial motor vehicle an essential function? Can job be restructured to remove commercial motor vehicle requirement?
- **Court:** Employee's case can go to trial
  - Employee drove commercial motor vehicle only 5% of the time
  - Employer regularly made small route adjustments
  - Employer judgment not dispositive: "If the rule were otherwise, an employer could insulate itself from ADA claims simply by deeming as 'essential' anything that the disabled employee could not do."

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Important Appellate Court Case
Accessible Software, Undue Hardship, Reassignment

Reyazuddin v. Montgomery County, Maryland
789 F.3d 407 (4th Cir. 2015)

- Plaintiff worked as an information and referral aide – performed job using screen reader software and a Braille embosser
- County opened a consolidated call center with inaccessible software
- Unlike coworkers, plaintiff was not transferred to new center
- Instead, she kept same salary, grade and benefits but supervisors struggled to find work for her
- **Lawsuit alleged the County violated the ADA by:**
  - Failing to accommodate Plaintiff by making software accessible
  - Failing to transfer Plaintiff to new call center
- **4th Circuit:** EE's case should proceed
  - Amicus brief filed by NDRN and 10 disability/civil rights groups

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Reasonable Accommodation: Making Software Accessible

4th Circuit: Factual issue = whether plaintiff is qualified

- Plaintiff: There are at least 2 ways to make software accessible
  - (1) Changed configuration of software
  - (2) Build a workaround "widget"
- Experts:
  - Plaintiff's experts testified that other call centers use similar model
  - Lowest suggested cost could be $129,000
  - County's expert said cost was closer to $648,000
  - County's budget was $3.73 billion

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Undue Hardship

District ct. erred in finding undue hardship as a matter of law

- Reduced multi-factor analysis to single factor—cost
  - No mention of number of employees OR the considerable cost savings realized by creating a centralized call center ($10m)
  - No discussion of substantial personnel resources working on software who could have met accommodation needs
- Other centers have been able to accommodate blind employees
- Relied on an "irrelevant factor" – County's budget
  - Analyzing undue hardship based on budgeting decisions would "effectively cede the legal determination on this issue"
  - "Taken to its logical extreme, the employer could budget $0 for reasonable accommodations and thereby always avoid liability"

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Reasonable Accommodation: Reassignment

District ct. erred in finding the County provided a reasonable accommodation as a matter of law by reassigning Plaintiff

- Law = An employer may provide an alternate accommodation
  - "Nonetheless, a reasonable accommodation should provide a meaningful employment opportunity. [This] means an opportunity to attain the same level of performance as is available to nondisabled employees having similar skills and abilities."
- Here, County cobbled together "make-work" tasks that did not amount to full-time employment
  - Even though Plaintiff maintained her salary, pay grade and benefits

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Reassignment May Be Necessary to Accommodate Commute

Araya-Ramirez v. Office of the Courts Administration
2015 WL 5098499 (D. P.R. Aug. 31, 2015)

- Judge with fibromyalgia worked in courthouse near her home for years
- She was reassigned to a courthouse farther away
- She requested to be assigned to a courtroom near her home because her commute exacerbated her symptoms – request denied
- **Court:** Denied Defendant's motion to dismiss
  - Plaintiff successfully pled that she requested a transfer to a particular courthouse, as there were several vacancies at the courthouse, but she was not transferred
  - Defendant unsuccessfully argued it provided an effective accommodation by offering an alternate location
  - No showing of undue hardship in light of various vacancies

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Update on Reassignment as a Reasonable Accommodation

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

EEOC v. United Airlines
693 F.3d 760 (7th Cir. 2012)

- United had a policy that employees with disabilities who could no longer do the essential function of their current jobs, could only compete for open positions as a reasonable accommodation
- **7th Circuit:** In light of the Supreme Court's decision in ***Barnett v. U.S. Airways,*** the ADA mandates that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship.

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Reassignment: 2015 Updates

Consent Decree in *EEOC v. United Airlines:*

www1.eeoc.gov/eeoc/newsroom/release/6-11-15.cfm

- Payment of $1,000,040 to a small class of former United employees
- Revise ADA reassignment policy
- Training and reporting requirements

Settlement between the DOJ and the University of Michigan:

www.ada.gov/univ_michigan/um_cd.html

- Revise policy to be consistent with EEOC guidance (www. eeoc. gov/policy/docs/accommodation.html#reassignment)
- Highlights: "Best qualified" standard is not applicable; Must reassign to vacant position that is most similar to current position
- Monetary payment, training and reporting requirements

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Update on Telework as a Reasonable Accommodation

EEOC v. Ford Motor Company

782 F.3d 753 (6th Cir. 2015)(en banc), overturning 752 F.3d 634 (6th Cir. 2014)

- Resale-buyer with irritable bowel syndrome requested to telework on an as-needed basis, up to 4 days per week
- **6th Circuit (2014 decision):** Jury question if physical presence at workplace was essential
  - Even when employee was at work, the vast majority of communications were done via conference calls
  - Technology has advanced; attendance is no longer assumed to mean attendance at the employer's physical location
  - The "law must respond to the advance of technology in the employment context . . . and recognize that the 'workplace' is anywhere that an employee can perform her job duties."

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Telework as a Reasonable Accommodation

En banc (2015 decision): Found for employer

- Regular and predictable attendance was an essential function
- Found job to be "interactive" requiring teamwork, meetings and availability to participate in face-to-face interactions
  - Other buyers regularly/predictably attend work on site and those who telecommute do so one day/week and come in if needed
  - Employee admitted that her absences caused mistakes and that 4/10 of her duties could not be performed at home
  - Technology used by Ford (email, computers, phone, limited video conferencing) existed when courts held on-site attendance to be essential for interactive jobs
- Thus – accommodation of telework was unreasonable
- Strong dissenting opinion

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But See…Positive Telework Case

Meachem v. Memphis Light, Gas and Water Div.

2015 WL 4866397 (W.D. Tenn. Aug. 10, 2015)

- Attorney required bed rest due to pregnancy-related impairment
- Requested telework - reviewed job description and explained how she could perform each task – request denied
- **Court:** Evidence that physical presence was not essential function
  - Only required telephone and remote access to case files
- Evidence that telework would not pose an undue hardship
  - Past practice of teleworking for another individual
  - Would only require scanning/emailing documents
- Jury verdict for plaintiff (9/1/15): $92k in compensatory damages
- Judge to decide equitable relief (back pay)

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Leave as a Reasonable Accommodation
Recent EEOC settlements

EEOC Settlement with Dialysis Clinic, Inc.

www.eeoc.gov/eeoc/newsroom/release/9-14-15.cfm

- Nurse terminated during 4-month medical leave for breast cancer treatment when she was cleared to return to work without restrictions after 2 more months
- **Settlement:** $190,000, Revised policies and training

EEOC Conciliation Agreement with Pactiv

www.eeoc.gov/eeoc/newsroom/release/11-5-15a.cfm

- Pactiv issued attendance points for medical-related absences; did not permit intermittent leave; did not allow leave or an extension of leave as a reasonable accommodation
- **Settlement:** $1.7m; Revised policies and training

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Reasonable Accommodation for Pre-Employment Drug Screen

EEOC v. Kmart Corporation

13-cv-02576 (D. Md.)

- Applicant with kidney disease could not provide urine sample
- Requested a reasonable accommodation (blood test, hair test, other form of drug test)
- Kmart refused the alternatives and denied applicant employment
- **Settlement Agreement (Jan 2015)**
  - $102,048 to applicant
  - Revised drug testing policies and forms to specify availability of reasonable accommodation in drug testing processes
  - Training on ADA policy and reasonable accommodations

www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm

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Medical Examination
Job-Related and Consistent with Business Necessity

Wright v. Illinois Dep't of Children & Family Svcs.
798 F.3d 513 (7th Cir. 2015)

- Following Plaintiff's encounter with child who lived at a Center, the Center's doctor barred Plaintiff from further contact with the child
- Supervisor/Administrator also expressed concern given Plaintiff's long-standing behavior including failure to follow orders
- Doctor issued a medical report questioning her ability to work with children – "her mental health needs to be assessed"
- DCFS ordered caseworker to undergo fitness for duty (FFD) exam
- Caseworker refused on numerous occasions
- **Jury:** FFD was not job-related & consistent with business necessity
- **District ct:** Denied DCFS's motion for judgment as a matter of law

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Medical Examination
Job-Related and Consistent with Business Necessity

- **7th Cir:** Upheld decision for plaintiff
- **Law:**
  - Medical exams of current employees must be "job-related and consistent with business necessity"
  - All employees, regardless of whether they have a qualifying disability under the ADA, are protected by the ADA's restrictions on medical exams/inquiries
  - Employer must have a reasonable basis based on objective evidence that a medical condition will impair the employee's ability to perform essential job functions OR that the employee will pose a threat due to a medical condition
  - Employer bears the burden of establishing business necessity
  - Burden is "quite high"

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Medical Examination
Job-Related and Consistent with Business Necessity

Support for 7th Circuit decision

- When a FFD was pending, common practice was to place employee on desk duty – here, Plaintiff continued to oversee her normal case load (22 cases) for almost 2 months
- Assigned Plaintiff to a new case while FFD was pending
  - Inconsistent application of its own policy
  - Suggests no real concern about safety
- Administrator testified that if she truly believed that the Plaintiff was a risk to children, she would have removed her cases
- Emails also suggested that the examination was unrelated to the Plaintiff's ability to do her job

Note: Facts did not support constructive discharge claim

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Medical Marijuana

Question

Now that states are legalizing the use of marijuana (both medically and recreationally), will the ADA protect employees who use marijuana?

Statutory language

ADA excludes "any employee or applicant who is currently engag[ed] in the illegal use of drugs, when the covered entity acts on the basis of such use."

42 U.S.C. § 12114 (a)

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Protecting use of medical marijuana: Attempts under state law

Coats v. Dish Network, LLC

350 P.3d 849 (Co. 2015)

- Employee with quadriplegia used medical marijuana in the evening to reduce muscle spasms
- Violated employer's drug policy
- **Lawsuit:** Employee alleged violation of state "lawful activity" statute
- **Colorado Supreme Court:** Found for employer
  - Marijuana is not lawful under federal law
  - Controlled Substance Act lists marijuana as a Schedule I substance and makes no exceptions for medicinal use or use in accordance with state law
  - Supremacy clause = conflicts resolved in favor of federal law

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Courts: No ADA protections because marijuana remains illegal under federal law

Colorado decision consistent with other states:

- ***California: Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008)** (employers not required to accommodate employee with disability who used medical marijuana legally)
- ***Montana: Johnson v. Columbia Falls Aluminum Co., LLC*, 213 P.3d 789 (Mont. 2009)** (ADA does not require employers to accommodate employees who use medical marijuana)
- ***Oregon: Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 230 P.3d 518 (Or. 2010)**
- ***Washington: Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586 (Wash. 2011)**

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Title II: State and Local Governments

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Olmstead Applied to Employment
Update on *Lane v. Brown*

Lane v. Brown (Kitzhaber)
12-cv-00138 (D. Or.)

- **2012:** Lawsuit filed by eight individuals with I/DD
  - Plaintiffs are able and would prefer to work in an integrated employment setting but instead were in sheltered workshops
  - Plaintiffs earned subminimum wages and had no contact with people without disabilities
- **2012:** Court denied State's motion to dismiss
  - 841 F.Supp.2d 1199 (D. Or. 2012)
  - Held: Title II's integration mandate applies to the provision of employment-related services
  - Court certified class

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Settlement in Oregon *Olmstead* case

- **2013:** DOJ intervened
  - www.ada.gov/olmstead/documents/lane_complaint.pdf
  - Average wage = $3.72/hr; over 50% earned less than $3.00/hr
- **2013 - 2015:** State took some efforts to reduce the number of individuals in sheltered workshops through executive orders
- **2015:** Parties reached settlement
  - By 6/30/22, Oregon will ensure that 1,115 working-age individuals currently in sheltered workshops can newly obtain competitive employment
  - Supported employment services will be individualized, and based on the individual's choices, strengths and capabilities
  - Compliance will be overseen by a neutral monitor

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Settlement in Oregon *Olmstead* case

- At least 4,900 youth ages 14-24 will be provided with employment services to prepare, choose, get and keep competitive employment
- All persons who receive supported employment services under the agreement will have the goal of working the maximum number of hours consistent with their abilities/preferences
- By 6/30/17, Oregon will reduce the number of working age adults with I/DD in sheltered workshops by 400 people
- At least half of those individuals will receive an individualized employment plan
- Transition planning can start for kids as early as 14 years old
- Local educational agencies may not include sheltered workshops in the continuum of alternative placements
- School instructional curricula ≠ activities similar to workshops

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Court Approved Class Action Settlement

Court approved settlement on 12/29/2015

www.centerforpublicrep.org/images/Order_approving_SA.pdf

- Plaintiffs had a reasonable likelihood of prevailing
  - *Olmstead's* integration mandate applies to employment services
  - State's undue reliance on segregated employment
- Recognizes change in federal policy reducing support for workshops
- Agreement is designed to achieve system-wide change over seven years by bringing many parties together
- If successful, will have a substantial benefit for the class as a whole

Fact sheet: www.justice.gov/opa/file/768236/download

Press release: https://droregon.org/lane-settlement-agreement/

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Does *Olmstead* Protect Institutional Living?

Illinois League of Advocates for the Developmentally Disabled v. Illinois Dep't of Human Services

803 F.3d 872 (7th Cir. 2015)

- Illinois planned to close Murray Development Center and assess residents for potential transfers into community living arrangements
  - Note: State was working under *Olmstead* consent decrees – litigation brought by EFE, Access Living, ACLU, and private firms
- Lawsuit brought by guardians of residents of state-operated facility
- Alleged: Community assessment process and intended closure violated the ADA and federal Medicaid law
- Sought preliminary injunction to prevent Illinois from closing Murray
- **District court:** Denied motion for preliminary injunction

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Murray Closure Case

7th Circuit: Affirmed district court decision

- Progressive language about benefits of community integration
- Cites research from amicus brief about benefits of community living
- Described Illinois as a "laggard outlier" in the national movement to transition residents out of institutions into community-based settings
  - Only two other states (NJ, TX) have more people with developmental disabilities living in state-operated institutions
  - 13 states have no state-operated developmental institutions
- No irreparable harm - even if Murray closed the plaintiffs would continue to have the option of institutional care if they desired

Amicus brief: www.equipforequality.org/wp-content/uploads/2015/04/Murray-Amicus-Brief-in-7th-Circuit-4-8-15.pdf

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Access to Judicial Proceedings

Prakel v. Indiana

2015 WL 1455988 (S.D. Ind. March 30, 2015)

- **Issue:** Whether the son of a criminal defendant was entitled to an ASL interpreter to attend his mother's court proceeding
- **Court:** Clear history of the public's right to attend criminal proceedings, and this is included within Title II's protections
- Undisputed that the plaintiff required an ASL interpreter to communicate effectively and that one was not provided
- Plaintiff was denied effective communication and the opportunity to enjoy the benefits of the courts' services, programs, and activities
- No undue burden to provide an interpreter to this individual on a limited number of occasions

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Access to Judicial Proceedings

Reed v. Illinois

2015 WL 6641959 (7th Cir. Oct. 30, 2015)

- Plaintiff has a rare neurological disorder (tardive dyskinesia)
- Causes Plaintiff to become mute, scream, or make involuntarily movements particularly when under stress
- Also has PTSD and bipolar disorder which cause severe anxiety
- State court: Personal injury case went to trial
- She requested accommodations from disability coordinator
  - Approved: Friend/family member could take notes; podium; occasional recesses
  - Denied: Microphone; Interpreter; Jury instruction explaining her disability

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Access to Judicial Proceedings

- During trial: Judge expressed annoyance with Plaintiff (told her to hurry up, glared at her)
- Jury verdict for defendant
- Plaintiff moved for a new trial due to inadequate accommodations
- Judge denied motion
  - Denied oral argument on motion because Plaintiff's severe speech impediment prevents her from communicating
  - But said her impediment was accommodated during trial
- Plaintiff appealed, but the Illinois appellate court affirmed without discussion about disability
- Plaintiff filed federal case under ADA/Rehabilitation Act
- District court: Granted motion to dismiss – collateral estoppel

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Access to Judicial Proceedings

7th Circuit: Reversed and remanded

- No bar "unless … no unfairness results to the party being estopped."
  - Unfair to deprive a litigant of an adequate day in court due to a disability that impeded effective litigation
  - Unfair for judge to adjudge her "incompetent to make an oral presentation" and that accommodations were adequate
- Cites *TN v. Lane* re: history of unequal treatment in justice system
- "For one court (state court) to deny accommodations without which a disabled plaintiff has no chance of prevailing in her trial, and for another court (federal district court) on the basis of that rejection to refuse to provide a remedy for discrimination that she experienced in her first trial, is to deny the plaintiff a full and fair opportunity to vindicate her claims."

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Trend: Effective Communication in Correctional Facilities

Pierce v. D.C.

2015 WL 5330369 (D.D.C. Sept. 11, 2015)

- Deaf individual was incarcerated for 51 days
- Prison staff never assessed Plaintiff's communication needs
- Assumed lip-reading and written notes were sufficient
- Plaintiff asserts he asked for an interpreter for medical intake, health services and various classes
- **Court:** Granted summary judgment for Plaintiff on effective communication and intentional discrimination
  - Denied prison's motion for summary judgment
- **Court:** Prison violated ADA/504 as a matter of law by failing to evaluate Plaintiff's need for accommodation when taken into custody

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Trend: Effective Communication in Correctional Facilities

Violation: Failure to assess needs of deaf inmate

- Prisons have an affirmative duty to assess the accommodation needs of inmates with known disabilities taken into custody
- Even if the individual has not made a specific request
- Prison officials cannot rely solely on their own assumptions

Violation: Plaintiff was not provided with required interpreter

- Requested interpreter – evidenced by notes, testimony
- Needed interpreter – evidenced by differences in ASL/English
  - Dealing with complex communications
  - Rejected argument that District employees said they believed Pierced understood them ("nonstarter")
- No undue hardship/fundamental alteration

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Trend: Effective Communication in Correctional Facilities

Holmes v. Godinez

2015 WL 5920750 (N.D. Ill. Oct. 8, 2015)

- Lawsuit alleges statutory and constitutional violations of deaf/hard of hearing inmates in Illinois Department of Corrections
- Granted Plaintiffs' motion for class certification
- Denied IDOC's motion for summary judgment
  - Sufficient evidence to proceed to trial with the class's claims under the ADA, Rehab Act, Religious Land Use and Institutionalized Persons Act, and claims under the U.S. Constitution related to the free exercise of religion, due process, and cruel and unusual punishment
- Denied IDOC's motion to exclude expert testimony of former ADA coordinator of a state correctional system

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Trend: Effective Communication in Correctional Facilities

Recent agreements out of Maryland and Kentucky

- Select settlement terms:
  - Deaf and hard of hearing inmates will have access to videophones to communicate with people outside of prison
  - Adequate visual notification of oral announcements concerning emergencies
  - Access to sign language interpreters and other auxiliary aids and services
  - Broad scheme of policy implementation, training, outreach, and monitoring to ensure equal treatment of deaf and hard of hearing individuals by prison officials

http://nad.org/news/2015/6/landmark-settlements-reached-maryland-and-kentucky-deaf-prisoners

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Miniature Houses and Service Animals

Anderson v. City of Blue Ash

798 F.3d 338 (6th Cir. 2015)

- Plaintiff brought ADA/FHAA claim against City for failing to modify its ordinance to permit her to have a miniature horse
- Background
  - Daughter has multiple disabilities and has difficulty with balance
  - Started using horse in 2010 for therapy in backyard
  - Neighbors complained because of "extremely offensive … smell of horse manure"
  - City ordered removal, didn't enforce order after rec'd doc note
  - Family got a second horse, which city ordered to remove (also had goats, chickens and pigs)

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Miniature Houses and Service Animals

- 2012-Replaced horses with one horse (who they currently have)
  - Trained horse to assist in navigating backyard, steadying her while she is walking, and helping her stand after a fall
- 2013-City passed an ordinance banning farm animals except as permitted by law
- Charged plaintiff, who defended herself by stating that the horse was permitted under the ADA/FHAA
- Plaintiff was convicted
- Plaintiff filed this affirmative lawsuit
- **District court:** Granted summary judgment for the City
  - Claim/issue preclusion bar lawsuit
  - Merits of ADA/FHAA case

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Miniature Houses and Service Animals

6th Circuit – Reversed/Remanded (Plaintiff's case can continue)

- Convictions have no preclusive effect - qualitative differences
- Evidence that the horse is individually trained to perform a task
  - Assists by steadying daughter as she walks so she can enjoy independent recreation and exercise in the backyard
- **City:** But animal doesn't help with ADLs
  - **Court:** Nothing to support argument that an animal must be needed in all aspects of daily life or outside the house to qualify for a reasonable modification under the ADA
- **City:** Not individually trained because trainer has no certification
  - **Court:** ADA regs have no certification requirement

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Miniature Houses and Service Animals

Assessment Factors

- (1) Type, size weight and whether facility can accommodate
  - Must look at horse at issue, not average horse – evidence that this horse is small and OK in shed
- (2) Whether the handler has sufficient control
  - Conflicting affidavits (daughter stepped on by horse v. effect of training)
- (3) Whether the horse is housebroken
  - Not housebroken, but just one factor and horse remains outside
- (4) Whether horse's presence compromises legitimate safety req
  - Past: Many complaints about unsanitary conditions
  - Now: Cleaning service, and support from neighbors

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Title III: Places of Public Accommodation

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Unlawful Orientation Despite Compliance with Architectural Standards

Kalani v. Starbucks Corp.

2015 WL 4571561 (N.D. Cal. July 28, 2015)

- Starbucks offers a variety of seating options
- Accessible tables comply with access requirements but require an individual in a wheelchair to sit facing the wall
- Parties stipulated that Starbucks strives to provide a "vibrant and inviting space" encouraging a "sense of community" and is a "neighborhood gathering space"
- **Issue:** Does plaintiff need to show a violation of ADA Standards?
- **Court:** No. ADA violations can be about "design" or "use" of public accommodation – this is about use/"full and equal enjoyment"
  - This is true even if the claim involves a regulated design element

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Equal Participation in Experiences

- **Issue:** Whether Starbucks provided an "opportunity to participate in" the Starbucks environment that is "equal to that afforded to other[s]"
- **Court:** Starbucks discriminated against Plaintiff by denying him equal participation in the "Starbucks experience"
  - Others use Starbucks as a social hub to see and interact with others in the community
  - Others can look at the on-goings of the store, the décor, other patrons/employees
  - Plaintiff enjoys people watching and conversing with strangers
  - Plaintiff must sit so that his back is to the store and others in it
- **Injunction:** Ordered to locate at least one accessible table such that a wheelchair-user can be seated with a view of the store

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Website Access

National Federation of the Blind v. Scribd, Inc.
2015 WL 1263336 (D. Vt. Mar. 19, 2015)

- Scribd's digital library is inaccessible to screen-reader users
- **Issue:** Is Scribd a place of public accommodation?
- **Court:** Denied Scribd's motion to dismiss
  - Cited *NAD v. Netflix*
  - Online library is place of public accommodation even if services are not at a physical location
  - To exclude from the ADA businesses that sell services via the internet would severely frustrate Congress' intent that people with disabilities fully enjoy the goods, services, privileges, and advantages available to other members of the general public

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Scribd Settlement

- Parties reached settlement after Court's decision - select terms:
  - Sets up a path to accessibility by end of 2017
  - WCAG 2.0 AA for website; BBC Mobile Accessibility Standards and Guidelines v1.0 for the mobile apps
  - Reprocess literary content to restore prior accessibility features
  - Process new literary content to preserve accessibility features
  - Pre-release testing, training
  - Appoint an accessibility coordinator
  - After completion date, will have on-demand remediation of documents that do not have accessibility features

https://nfb.org/images/photos/scribd%20settlement%20agreement%20and%20release.pdf

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Website Access: Recent Settlement

DOJ Settlement Agreement with EdX, Inc. (April 2015)

- EdX contracts with over 60 institutions of higher learning
- Provides massive open online courses, and operates a website, mobile application and a Platform
- **Settlement (select terms):**
  - Compliance with WCAG 2.0 within 18 months
  - Requires content providers to certify that provided courses meet certain requirements
  - Retain a website accessibility consultant
  - Designate a website accessibility coordinator

www.ada.gov/edx_sa.htm

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Requirement to Administer Emergency Medication - Diastat

DOJ Settlement with Camp Bravo (June 2015)

- Camp refused to admit camper with epilepsy who required emergency medication for seizures
- **Settlement:** Camp will train staff to administer Diastat
  - Adopt Seizure Emergency Action Plan and Physician's Order for the Administration of Diastat so that it has individual instructions
  - Provide training to staff responsible for camper with epilepsy
- **DOJ:** "It is the United States' position that it generally will be a reasonable modification by title III of the ADA for certain public accommodations, such as camps and child care service providers, to train laypersons to administer Diastat."

www.ada.gov/camp_bravo_sa.html

Stay tuned: *US v. NISRA (12-cv-7613, N.D. Ill.) – waiting decision*

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Requirement to Administer Emergency Medication - Glucagon

DOJ Settlement with Winnewald Day Camp (June 2015)

- Camper with diabetes alleged camp refused to modify policies to provide him with diabetes management care
- **Settlement:** Adopt ADA/Diabetes policy
  - Individually assess the needs of each child with diabetes
  - Staff will assist child and/or take steps reasonably consistent with Diabetes Management Plan
  - Qualified professional will provide training – includes practices related to regulating glucagon and insulin administration

www.justice.gov/usao-nj/file/765696/download

See also www.justice.gov/file/campadaflyerpdf/download (Camps must train staff to administer . . . emergency medications, such as glucagon and Diastat, just as they do for the proper use of Epi-Pens)

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Hot Topic VRI v. In-Person Interpreters

Potential problems with VRI:

- DOJ: Individual cannot access screen because of vision loss; cannot access screen because of positioning due to injury - www.ada.gov/effective-comm.htm
- NAD: Concerned about overreliance, technological problems, lack of adequate training - http://nad.org/issues/technology/vri/position-statement-hospitals

Perez v. Doctors Hosp. at Renaissance, Ltd.,
2015 WL 5085775 (5th Cir. Aug. 28, 2015)

- Deaf parents of patient requested ASL interpreters
- **5th Cir:** Allowed parents' claim to move forward
  - Evidence that interpreters were requested but not provided
  - VRI was ineffective – staff did not know how to use it

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VRI v. In-Person Interpreters

Shaika v. Gnaden Huetten Memorial Hospital

2015 WL 4092390 (M.D. Pa. July 7, 2015)

- The Hospital's VRI did not work, so staff used written notes to communicate to the plaintiff that her daughter had passed away
- **Court:** Denied motion to dismiss with respect to whether the hospital had acted with deliberate indifference to the plaintiff's rights

Silva v. Baptist Health South Florida

2015 WL 6150770 (S.D. Fla. Oct. 13, 2015)

- Concluded that hospital provided effective communication
- "Plaintiffs' requests for in-person interpreters do not make in-person interpretation a necessity under the ADA and RA."

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VRI v. In-Person Interpreters

Weiss et al v. Bethesda Health, Inc

No. 15-cv-80831 (S. D. Fla. June 6, 2015)

- Hospital refused to provide in-person interpreter for labor/delivery
- Plaintiff filed a motion for a preliminary judgment
  - VRI was ineffective for many reasons - she would likely be in various positions and blocked from a clear line of sight
  - Had experienced technological problems with VRI in the past
- Before court ruled (after magistrate issued recommended opinion), the plaintiff delivered her baby so the motion was denied as moot
- Plaintiff amended complaint to include allegations of the problems experienced with VRI during her labor/delivery, and hospital stay
- **Status:** In discovery; set for trial in October 2016

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Ride Sharing Litigation

Ramos v. Uber Technologies, Inc

2015 WL 758087 (W.D. Tex. Feb. 20, 2015)

- Lawsuit alleged that Uber and Lyft:
  - Have no vehicle-for-hire services for individuals who use wheelchairs
  - Allow their drivers to deny services to people with disabilities
  - Provide no training about serving customers with disabilities
  - Have no mechanism to service individuals who use wheelchairs
- **Uber/Lyft motion to dismiss:** Plaintiffs must prove we are places of public accommodation to be covered by Title III
- **Court:** No. Title III = § 12182 (public accommodations) *and* § 12184
  - § 12184: Applies to specific public transportation services primarily engaged in business of transporting people

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Ride Sharing Litigation

Lyft/Uber argues: Not subject to § 12184

- Uber: Does not provide specified public transportation services
- Uber: Not engaged in business of transporting people but rather are a mobile-based ridesharing platform to connect drivers/riders
- Lyft: Does not own vehicles; just connects people with particular skills/assets to connect with people looking to pay for skills/assets

Court: Plausibly subject to § 12184

- ADA applies to situations not expressly anticipated

Lyft/Uber argues: No violation of provision requiring training (49 C.F.R. § 37.173) of personnel because it doesn't employ its "app-users"

Court: Whether drivers are "personnel" is not an issue that can be decided on a motion to dismiss

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Ride Sharing Litigation

Lyft/Uber argues: We have no ability to require app users to modify personal vehicles or control conditions

Court:

- Some control
  - Over drivers (requires license, car insurance, clean record, 4-door vehicle)
  - Over app to permit riders to request a specific type of vehicle
- Regulations do not require defendants to "purchase vehicles other than automobiles in order to have a number of accessible vehicles in their fleets."

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Ride Sharing Litigation

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

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

- Alleged that Uber discriminates against people who are blind by refusing to transport guide dogs
  - Claims under 42 USC § 12182 (public accommodation) and 42 USC § 12184 (specified public transportation service)
- Uber filed a motion to dismiss – Uber within the scope of Title III?
  - Issues of associational/individual standing
- DOJ filed a statement of interest
  - No opinion about public accommodation
  - DOT regs re: § 12184 cover taxis/other demand responsive transportation services

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Ride Sharing Litigation

Court: Denied motion to dismiss – Plaintiffs' claim can proceed

- ADA lists 12 categories of types of places of public accommodation
- Plaintiffs allege that Uber falls within "travel service" category
- ADA doesn't define travel service
- Cites *Carparts*: By including "travel service," Congress contemplated ADA coverage by service providers that lack physical structure
- No binding law that Uber's services are precluded from regulation as a travel service
- Therefore, when taking Plaintiffs' allegations as true, Uber qualifies as a place of public accommodation

Status: Currently in discovery and settlement discussions

DOJ statement of interest: www.ada.gov/briefs/uber_soi.pdf

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- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA at 877-232-1990 (V/TTY) or webinars@ada-audio.org

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

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Top ADA Cases of 2015

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Next ADA Legal Webinar Session

March 16, 2016

Topic and Speaker: TBD

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