

Legal Briefings

Prepared by:
Equip for Equality ¹



Impact of the Supreme Court's ADA Decisions

This legal brief will examine United States Supreme Court decisions under the Americans with Disabilities Act (ADA) that are still viable after passage of the Americans with Disabilities Amendments Act of 2008 (ADAAA).² While the ADAAA explicitly overruled the Supreme Court decisions in the *Sutton* trilogy³ and *Toyota v. Williams*,⁴ there are many Supreme Court ADA cases that are still good law. In this legal brief, the Supreme Court decisions will be analyzed followed by a selection of lower court decisions applying the Supreme Court's precedent. In discussing these cases, please note that employees are also referred to as plaintiffs and the companies as defendants.

Title I of the ADA

Supreme Court Case: *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)

Robert Barnett worked in a cargo handling position for U.S. Airways. After a back injury, Barnett invoked his seniority rights and transferred into a less physically intensive position in the mailroom. Barnett learned that other employees with more seniority were planning to bid on this position, and consequently, would bump Barnett from his job. As a reasonable accommodation under the ADA, Barnett asked U.S. Airways to make an exception to the seniority system so that he could retain his mailroom job. U.S. Airways denied his request and Barnett lost his job when he was bumped by an employee with more seniority. Barnett filed suit under the ADA, and U.S. Airways defended itself by arguing that the ADA did not trump its seniority system. The Supreme Court noted the importance of seniority in employee-management relations and held that ordinarily, if an employer shows that an employee's requested accommodation conflicts with seniority rules, then the requested accommodation constitutes an undue burden and is not reasonable. However, the employee may present evidence of special circumstances demonstrating that an exception to a seniority rule is reasonable in a specific case. For instance, if an employer retained the right to change the seniority system unilaterally and frequently exercised that right, there would be a stronger argument that making an exception for an employee with a disability would not be an undue hardship. An employee might also prevail by showing that the seniority system already contains exceptions and one further exception is unlikely to matter.

Subsequent Interpretations by Lower Courts:

- *Dilley v. Supervalve, Inc.*, 296 F.3d 958 (10th Cir. 2002)

A truck driver with a lifting restriction requested a reassignment to a route that did not require heavy lifting. The employer argued that the reassignment would violate its seniority system because a more senior employee could later bid for the new position. The court disagreed, stating that there was only a "potential violation of the seniority system." As the employee had the requisite seniority, and the

Impact of the Supreme Court's ADA Decisions

employer could remove him later if a more senior employee requested the position, reassignment should have been available.

- **Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007)**

Plaintiff worked as a dry grocery order filler when she permanently injured her right arm and hand, rendering her unable to perform her job. As a reasonable accommodation, plaintiff sought reassignment to a vacant and equivalent position as a router. Plaintiff argued that defendant should have automatically reassigned her without requiring her to compete with other applicants for the position. Defendant disagreed, based on its policy of hiring the most qualified applicant. Ultimately, it did not reassign plaintiff to this position. Based on *Barnett*, the Eighth Circuit held that an employer who has an established policy to fill vacant positions with the most qualified applicant is not required to reassign a disabled employee to a vacant position if the disabled employee is not the most qualified applicant. The court noted that to find otherwise would be to turn away a superior applicant in favor of an employee with a disability, which would amount to affirmative action. It also noted that defendant did not violate the ADA because it did place plaintiff in another position, albeit not plaintiff's preferred alternate position.

- **Sicilia v. United Parcel Service, Inc., 279 Fed.Appx. 936 (11th Cir. 2008)**

Plaintiff requested that he be transferred to a day-shift position as a reasonable accommodation. Following *Barnett*, the Eleventh Circuit explained that defendant was not required to violate its own seniority system to accommodate plaintiff.

- **Gamez-Morales v. Pacific Northwest Renal Services, LLC, 304 Fed.Appx. 572 (9th Cir. Dec. 22, 2008)**

Plaintiff asked defendant to transfer her to another workstation as a reasonable accommodation. Defendant denied plaintiff's request because it conflicted with defendant's neutral policy prohibiting employees from transferring positions within six months of a disciplinary action. The district court granted summary judgment to defendant, and the Ninth Circuit affirmed. Relying on *Barnett*, the Ninth Circuit found that because

plaintiff's transfer would violate defendant's neutral policy, it was not a reasonable accommodation unless plaintiff produced evidence of special circumstances. In this case, plaintiff failed to present such evidence.

- **Tobin v. Liberty Mutual Insurance Co., 553 F.3d 121 (1st Cir. 2009)**

An employee with bipolar disorder experienced ongoing performance issues. As a reasonable accommodation, he repeatedly requested that his employer provide him with increased support staff to respond to customer service calls and assign him to manage a "mass marketing" account. Mass marketing accounts are group insurance programs offered to businesses and other institutions. The employee requested assignment to these accounts because they offer access to a large volume of potential clients. Plaintiff argued that had he been assigned to such an account, he would have been compensated for the disadvantages caused by his disability. The jury found for employee and the company appealed. On appeal, Liberty Insurance argued that the employee's request was unreasonable because the company awarded mass marketing accounts as perks to the highest performing agents, analogizing this policy to the neutral seniority system in *Barnett*. The First Circuit rejected this argument. It pointed to the Supreme Court's examples of circumstances in which a reasonable accommodation is not unreasonable, and found them to be applicable in this case. The court pointed to evidence produced at trial showing that defendant awarded mass marketing accounts on a case-by-case discretionary basis, and not solely for sales performance. In addition, Liberty Mutual sometimes assigned mass marketing accounts to new sales representatives or low-producing sales representatives to jumpstart their business. Managers admitted that they had the discretion to assign a mass marketing account to plaintiff, but chose not to do so. For these reasons, the court found that the exceptions recognized in *Barnett* were applicable and found for the employee.

Note: Unresolved Issue in Reassignment Cases: Direct Placement or the Right to Compete

One unresolved issue regarding reassignment is

Impact of the Supreme Court's ADA Decisions

whether it means the employee is directly placed in the position if qualified (even if there are better qualified candidates), or whether the employee merely gets the right to compete for the position. The EEOC contends that the employee does not need to be the best qualified individual for the position and should not have to compete for it.⁵ "Reassignment means that the employee gets the vacant position if s/he is qualified for it." Otherwise, "reassignment would be of little value and would not be implemented as Congress intended."⁶ Some Courts follow the EEOC's position, (the 10th and D.C. Circuits) and others do not (the 7th and 8th Circuits).⁷ The *Huber* case discussed above, did not follow the EEOC Guidance and was appealed to the U.S. Supreme Court. However, the case settled before the case was decided, so the split of circuits on this issue continues. ***Huber v. Wal-Mart Stores, Inc.*, 128 S.Ct. 1116 (U.S. Jan. 14, 2008).**

Supreme Court Case: *Raytheon v. Hernandez*, 540 U.S. 44 (2003)

In *Raytheon v. Hernandez*, an employee for Raytheon, Mr. Hernandez, tested positive for cocaine. As a result, he resigned in lieu of termination, pursuant to his Raytheon's policy. More than two years later, Hernandez had gone through rehabilitation, was no longer using drugs, and reapplied for a position with Raytheon. Raytheon did not hire him, citing its policy not to rehire former employees who were terminated for workplace misconduct. Hernandez sued, alleging discrimination under the ADA. Specifically, Hernandez alleged disparate treatment by his employer on the basis of his record of a drug addiction, and/or on the basis of being regarded as having a drug addiction. In response to his employer's motion for summary judgment, Hernandez additionally argued that even if his employer's no-rehire policy was facially neutral, it had a disparate impact on people with disabilities, and therefore still violated the ADA. The Supreme Court, careful not to conflate the disparate treatment and disparate impact analyses, explained that with regard to disparate treatment, the employer provided a neutral no-rehire policy that applies to all former employees terminated for workplace misconduct, not just former employees with disabilities. This policy constituted a

legitimate, nondiscriminatory reason for its decision not to rehire Hernandez. With regard to the disparate impact of the facially neutral policy, Hernandez did not timely raise this argument as it was first raised on appeal. Because the Court of Appeals conflated the disparate treatment and impact issues, the Supreme Court vacated its judgment and remanded the case.

Query: Would this case have been decided differently if Mr. Hernandez had timely raised his disparate impact argument? (See, DBTAC: Great Lakes Center Webinar on Disparate Treatment and Disparate Impact)

Note: It is interesting to compare the description in the facts by Justice Thomas with the facts described in the Appellate Court decision, *Hernandez v. Hughes Missile Systems Co.*, 292 F.3d 1038 (9th Cir. 2002). This is especially true as *Raytheon* has been cited for the proposition that an employer must know of a disability to be liable for discrimination. See, e.g., *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69 (2nd Cir. 2002).

Subsequent Interpretations by Lower Courts:

- ***Bates v. United Parcel Service, Inc.*, 511 F.3d 974 (9th Cir. 2007)**

Bates involved a class of deaf and hard of hearing employees and job applicants who could not pass Department of Transportation (DOT) hearing standard imposed by the employer on all of its package-car drivers sued under the ADA and state law. The trial court found in favor of the plaintiff and a panel of the 9th Circuit affirmed that decision. However, upon rehearing by all of the 9th Circuit judges, the lower court decision was reversed and sent back to the district court. The federal government only requires drivers of trucks in excess of 10,000 pounds to pass the DOT test, but UPS requires all of its drivers to pass the DOT test. UPS alleges "hearing" at a level sufficient to pass the DOT hearing standard is either a stand-alone essential job function or part of the identified essential function of being a "safe driver." Because the district court did not analyze whether plaintiffs are "qualified individuals" capable of performing the "essential function" of safely driving a package car, the case was remanded to the district court for the

Impact of the Supreme Court's ADA Decisions

employees to prove that they are so qualified. Only if they meet this burden does the question become whether the qualification standard used by the employer (passing the DOT test) satisfies the business necessity defense. *Bates* cited *Raytheon* for the proposition that the business necessity test applies to disparate treatment and disparate impact claims.

- **Conner v. State Farm Mutual Automobile Ins. Co., 2006 WL 435511 (Feb 17, 2006)**

Conner involved an age discrimination claim rather than the ADA. In *Conner*, an individual sued State Farm, alleging that it did not hire her due to her age. An industrial psychologist was asked by the plaintiff to review and analyze State Farm's hiring practices, and he determined that applicants over 40 years old were less likely to be selected as agents. State Farm moved to strike this evidence, arguing that while plaintiff's claim alleges disparate treatment, the analysis supports only a claim for disparate impact, and therefore should be stricken in accordance with *Raytheon*. The court rejected this argument and denied State Farm's motion, explaining that the analysis takes into account State Farm's subjective judgment in their hiring decisions. In accordance with *Raytheon*, discrimination claims based on disparate treatment, unlike claims of disparate impact, focus on the employer's subjective intent. Additionally, the court noted that State Farm misread *Raytheon*. While *Raytheon* held that courts must be consistent by analyzing a discrimination claim as either one of disparate treatment or disparate impact, it did not hold that evidence submitted by a party in a discrimination case must be analyzed using one standard or the other.

- **Supreme Court Case: Chevron v. Echazabal, 536 U.S. 73 (2002)**

In *Chevron v. Echazabal*, plaintiff was offered a job contingent on passing a medical examination. The examination revealed a liver abnormality that was eventually diagnosed as Hepatitis C. The employer's doctors determined that plaintiff's condition would be aggravated by continued exposure to toxins at the employer's refinery. Accordingly, the employer withdrew the employment offer on the basis that plaintiff would

pose a direct threat to his own health and safety. Plaintiff sued, alleging discrimination on the basis of his disability in violation of the ADA. The issue was whether the defense of direct threat was limited to a "threat to others," as set forth in the ADA, or if it also included a "threat to self" as defined in the EEOC's Title I Regulations. The Supreme Court held that direct threat included "threat to self." Therefore, the employer's actions were deemed valid under the ADA. The Court emphasized that under the ADA's direct threat analysis, employers will have to rely upon the best available objective medical knowledge and conduct an individualized assessment of the employee's present ability to safely perform the essential functions of the job instead of relying on stereotypes or paternalistic perspectives.

- **Subsequent Interpretations by Lower Courts:**

- **Darnell v. Thermafiber, Inc., 417 F.3d 657 (7th Cir. 2005)**

In *Darnell*, a job applicant who had diabetes sued an employer for disability discrimination in violation of Title I of the ADA when the employer rescinded his job offer based on the results of his pre-employment medical exam. The district court granted summary judgment to the employer based on a showing that the individual's diabetes would cause a "direct threat to safety" at the employer's plant. Affirming the lower court, the Seventh Circuit explained that in accordance with *Chevron*, the employer relied on sufficient objective medical evidence and an individualized assessment in determining that the applicant would cause a direct threat to the safety of others and to himself. The court emphasized the applicant's diabetes, his admitted failure to adequately control his diabetes in the past, and the physical requirements of working in the employer's plant (e.g. climbing ladders, operating dangerous machinery, lifting heavy equipment).

- **Clayborne v. Potter, 448 F.Supp.2d 185 (Dist. Columbia 2006)**

In *Clayborne*, a U.S. Postal Service (USPS) employee sued her employer under the Rehabilitation Act when she was placed on sick leave and had her duties reduced because

Impact of the Supreme Court's ADA Decisions

of her retinis pigmentosa, an eye condition causing significant vision loss. In granting summary judgment for the USPS, the court relied on the argument that the employee posed a direct threat to her own safety. The court relied on *Echazabal* and *Darnell* in recognizing the threat-to-self defense, and then explained that the defense applied here, as the employee had been injured at work on three separate occasions as a result of her poor vision. (She tripped while entering the building, twisted her ankle when walking to the time clock to begin work, and bumped her head with a plastic tray). Because the employee's disability caused a direct threat to her own safety, the USPS was not liable for disability discrimination under the Rehabilitation Act.

- ***Celano v. Marriott International, Inc.*, 2008 WL 239306 (N.D. Cal. 2008)**

In a case arising under Title III of the ADA, individuals sued defendant, who operated several golf courses, under Title III of the ADA. Plaintiffs alleged that defendant violated Title III when it failed to provide "single-rider" golf carts, which allow individuals with limited mobility to hit golf balls while seated in the cart. On cross motions for summary judgment, Defendant argued that providing the carts would pose a "direct threat to the health and safety of others." Defendant, relying on *Echazabal*, only provided evidence that the carts posed a direct threat to the individual driving the cart, not to others. The Court distinguished *Echazabal*, explaining that it was brought under Title I of the ADA, not Title III. The Court in *Echazabal* relied on an EEOC regulation interpreting the Title I "direct threat" defense as applicable to a threat to one's self. There was no analogous implementing regulation to rely on in this case that would permit expanding the Title III direct threat defense to include a threat to one's self, and the court therefore declined to do so. Because the direct threat defense was inapplicable, plaintiffs' motion for summary judgment was granted on this issue.

- ***Rodriguez v. ConAgra Grocery Product Co.*, 436 F.3d 468 (5th Cir. 2006)**

A job applicant with diabetes was denied employment because of a belief that he would be a direct threat in the workplace when his glucose level was found to be high. The court denied the

defendant's motion for summary judgment holding that the generalizations and false beliefs by the person in charge of hiring were contrary to the ADA's mandate to conduct an individualized, independent assessment.

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

Plaintiff's application to be an officer with the Foreign Service was rejected because of his HIV status. The State Department has a policy prohibiting the hiring of people with HIV for these positions, claiming that they may require medical treatment that is not available in less-developed countries where they might be stationed. Relying on *Echazabal*, the trial court held plaintiff would potentially be a direct threat to himself if he were hired and deployed to a place that could not meet his medical needs. The D.C. Circuit court reversed finding that there may be reasonable accommodations that would be able to reduce the alleged direct threat so that there was not a substantial risk of significant harm to the plaintiff's health. (In February 2008, the State Department announced it was lifting its ban on hiring people with HIV in the Foreign Service.)

Supreme Court Case: *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999)

In January of 1994, while employed by Policy Management, Carolyn Cleveland had a stroke that impaired her concentration, memory and language skills. Three weeks after her stroke, Cleveland applied for SSDI stating that she was "disabled" and "unable to work." In April of 1994, Cleveland's condition improved, she returned to work. She reported this to the Social Security Administration [SSA], which in turn denied her application for SSDI. Around this time, Cleveland requested, as a reasonable accommodation, that she receive training and additional time to complete her work. Policy Management denied Cleveland's requests, and in July of 1994, terminated her employment. In September of 1994, Cleveland asked SSA to reconsider its denial, stating: "I was terminated [by Policy Management Systems] due to my condition and I have not been able to work since. I continue to be disabled." She later added that Policy

Impact of the Supreme Court's ADA Decisions

Management Systems terminated her because she “could no longer do the job” in light of her “condition.” In November of 1994, SSA denied Cleveland's request for reconsideration, and Cleveland sought an SSA hearing, reiterating: “I am unable to work due to my disability.” Eventually SSA awarded Cleveland SSDI benefits. Around the same time, Cleveland filed an ADA lawsuit. In defense of the suit, Policy Management argued that Cleveland's receipt of SSDI benefits automatically estopped her from pursuing an ADA claim because she stated on her SSDI application that was not qualified.

The Supreme Court noted that a plaintiff's sworn assertion in an application for disability benefits stating that she is unable to work appears to negate the essential element of her ADA claim that she can perform the essential functions of her job. However, the Court held that this should not automatically estop plaintiff from proceeding with her ADA case, noting that there are many situations in which an SSDI claim and an ADA claim can co-exist. However, a plaintiff must provide an explanation of this apparent inconsistency. The Court stated that plaintiff's explanation must be sufficient to warrant a reasonable juror's concluding that assuming the validity of plaintiff's earlier statement, she could perform the essential functions of her job, with or without reasonable accommodation. For example, because the SSA does not take into account the possibility of “reasonable accommodation” in determining SSDI eligibility, an ADA plaintiff's claim that she can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that she could not perform her own job (or other jobs) *without* it. The Court also noted that an individual might qualify for SSDI under SSA's administrative rules and yet, due to special individual circumstances, be capable of performing the essential functions of her job. Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working, such as in its 9-month trial-work period. In addition, an individual's condition might change over time, so that a statement about her disability made at the time of her application for SSDI benefits does not reflect her capacities at the time of the relevant employment decision. Finally, the Court noted that pleading in the alternative is permissible under the Federal Rules of Civil Procedure.

The Court directed that SSA statements be taken in their legal context and distinguished between legal and factual statements. An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, ‘I am disabled for purposes of the Social Security Act.’ The Court distinguished these context-based statements from factual statements, e.g. “I can/ cannot raise my arm above my head.” Regarding purely factual inconsistencies, the Court notes on three occasions that it is leaving the law “where [it] found it.”

As applied to Cleveland, the Court opined that Cleveland explained the discrepancy between her statements sufficiently to bypass summary judgment because the statements made to SSA were in a forum that did not consider the effect of reasonable accommodations in the workplace. She also stated that her claims were accurate in the time period in which they were made.⁸

Query: Does the Ticket to Work and Work Incentives Improvement Act of 1999 add more weight to Cleveland's holding?

Subsequent Interpretations by Lower Courts:

- ***Solomon v. Vilsack*, 2009 WL 2986608 (D.D.C. Sept. 16, 2009)**

A federal employee with depression and anxiety worked in the U.S. Department of Agriculture. After missing work for disability-related reasons, plaintiff decided to apply for retirement disability benefits under the Federal Employees Retirement System (FERS). She also filed this lawsuit under the Rehabilitation Act. The court found that plaintiff's receipt of FERS precluded her case under the Rehabilitation Act. Employees are eligible for benefits under the FERS after working for 18 months in civil service and who are “unable, because of disease or injury, to render useful and efficient service.” The application specifically asks if the agency has been able to provide an accommodation. Further, under its implementing regulations, FERS disability benefits are available only if accommodations of the disabling medical

Impact of the Supreme Court's ADA Decisions

condition are unreasonable. The court explained that because this program's eligibility program considers reasonable accommodations, unlike eligibility for Social Security, the receipt of FERS benefits precludes a federal employee's failure-to-accommodate claim.

- ***Finan v. Good Earth Tools, Inc.*, 565 F.3d 1076 (8th Cir. 2009)**

A salesman sued his former employer for discrimination under Title I of the ADA. The salesman was employed from 1996 to 2004. In 2001, he began experiencing seizure-like symptoms, and after drooling at a sales meeting, his employer sent him home, ordered him to get a medical evaluation and told him not to contact any customers. The fitness-for-duty evaluation found plaintiff fit and he returned to work. Finan was later diagnosed with a complex partial seizure disorder and epilepsy. At this time, Finan applied for, and received, private long-term disability benefits. He worked from home for a while and then was terminated. Following his termination, Finan applied for Social Security disability benefits. Finan brought suit under the ADA, asserting that he was terminated because he was "regarded as" having a disability. The jury awarded him \$410,000 in back pay and \$65,000 in damages. The employer appealed, arguing that the employee's "regarded as" claim failed because he was in fact disabled under the ADA and his disability rendered him unable to perform the essential functions of his job. The Eighth Circuit affirmed. The Eighth Circuit rejected the employer's argument that the Finan's receipt of private and Social Security benefits demonstrated that he had an actual ADA disability, noting that the definition of "disabled" used by the private insurer and the Social Security Administration differed from that of the ADA.

- ***Butler v. Village of Round Lake Police Dep't*, 585 F.3d 1020 (7th Cir. 2009)**

The Seventh Circuit upheld the lower court's grant of summary judgment for the defendant. Plaintiff, a former police sergeant with chronic obstructive pulmonary disease, was placed on leave until he received a full clearance that he could perform "all the normal duties expected of a police officer." The plaintiff later applied for pension benefits saying he was permanently disabled from police duties. The

court ruled that plaintiff was estopped from bringing this claim because he failed to offer a sufficient explanation for the contradictions between his statements.

- ***Crews v. Dow Chemical Co.*, 287 Fed.Appx. 410 (5th Cir. Jul. 29, 2008)**

A human resources employee sued her employer under the ADA after the employer restricted her from various tasks pending a fitness-for-duty evaluation, cancelled her promotion, and terminated her. The plaintiff alleged that defendant discriminated against her based on her noticeable hand tremors. After filing an EEOC discrimination complaint, the plaintiff revealed that she had received treatment for depression and bipolar disorder and requested full-time, paid medical leave under the FMLA. Once the FMLA leave expired, the plaintiff applied for and received Social Security benefits and long-term disability based on a physician's assessment that she was indefinitely incapable of returning to work. The defendant terminated the plaintiff after she officially began receiving long-term disability benefits. The Fifth Circuit upheld the lower court's finding that the plaintiff could not claim to be unable to work for the purpose of receiving long-term Social Security benefits, while simultaneously claiming to be qualified and capable of working for the purpose of her ADA claim. The court affirmed summary judgment in favor of the defendant because, by her own admittance, the plaintiff was not a "qualified individual with a disability" under the ADA as required to show discrimination.

- ***Krensavage v. Bayer Corp.*, 2008 WL 177802 (3rd Cir. Jan. 22, 2008)**

The district court found that plaintiff was not a qualified individual under the ADA. Prior to this lawsuit, plaintiff filed for both long-term disability benefits and SSDI, representing that she was unable to work. The district court relied on her representation and concluded that she was unqualified for her position, negating an essential element of her ADA claim. On appeal, plaintiff argued that her statement did not preclude her suit because her prior statement did not consider whether she could work with a reasonable accommodation. The Third Circuit affirmed. The

Impact of the Supreme Court's ADA Decisions

court explained that the plaintiff's only accommodation request was for an extended unpaid leave and even if she were granted this accommodation, it would not render her qualified to perform the job's essential functions.

- **Voeltz v. Arctic Cat, Inc., 406 F.3d 1047 (8th Cir. 2005)**

After a request for a reasonable accommodation was denied, an employee applied for Social Security benefits at suggestion of the company's human resource department. The employee stated that he could have worked "just fine" if his Multiple Sclerosis had been accommodated. His doctor suggested the reasonable accommodations of: modified job duties, modified schedule, and an occupational therapist consult. Applying *Cleveland*, a jury verdict for employee was upheld on appeal as the employee would have been able to work with a reasonable accommodation.

Supreme Court Case: **Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998)**

Caeser Wright worked as a longshoreman, and was subject to a collective bargaining agreement between his union and an association of stevedore companies. When the stevedore companies found out that Wright had settled a claim for permanent disability, they refused to employ him. Wright sued in federal court under the ADA, but the employers asserted that Wright's failure to arbitrate his claim, as required by the collective bargaining agreement (CBA), barred his lawsuit. The Supreme Court opined that arbitrators are in a better position than courts to interpret the terms of a collective bargaining agreement. However, Wright's claims did not involve the terms of the CBA, but rather a federal statutory right under the ADA. A dispute of federal law, as opposed to a dispute of the terms of a contract, is not presumed to be included within a general arbitration requirement. A waiver of a statutorily protected right to a judicial forum in favor of arbitration must be "clear and unmistakable." The CBA in this case did not meet the "clear and unmistakable" standard to waive Wright's ADA claim, as the arbitration clause was stated very generally.

Note: The Court did not reach the issue of whether such a "clear and unmistakable" waiver of an ADA claim would be enforceable.

Subsequent Interpretations by Lower Courts:

- ***Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machines, Local Union No. 550, International Brotherhood of Teamsters*, 167 F.3d 764 (2nd Cir. 1999)**

In this case, an employer and the union entered a collective bargaining agreement with a broad arbitration clause. The employer sued the union in federal court under the Labor Management Relations Act, due to an alleged violation resulting from a strike by the union. The union moved for summary judgment, arguing that the employer's claim was subject to arbitration. Upholding summary judgment for the union, the court explained that the rule in *Wright*, that waiver of a statutorily protected right to a judicial forum must be "clear and unmistakable" to be enforceable, is inapplicable when it is an employer, and not an employee subject to a union's collective bargaining agreement, whose right is at issue. The court explained that *Wright's* "clear and unmistakable" rule is based on concern with allowing a union to waive an individual's statutory right. An individual should not have his rights waived by someone else, unless it is "clear and unmistakable." However, where the right belongs to the employer, this concern is not present. The employer negotiated the agreement on its own behalf, and it can waive its statutory right to a judicial forum even if that waiver is in a broad arbitration clause, and is not "clear and unmistakable."

See also *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702 (5th Cir. 2002) (explaining that *Wright* is limited to the context of a collective bargaining agreement. An employee, not represented by a union or subject to a collective bargaining agreement, can waive his statutory right to a judicial forum on his own behalf without a clear and unmistakable waiver.).

- ***O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003),**

In *O'Brien*, police officers sued their police

Impact of the Supreme Court's ADA Decisions

department and town in federal court, alleging that the method of determining overtime pay violated the Fair Labor Standards Act (FLSA). The officers were members of a union that had a collective bargaining agreement with the town, which included an arbitration clause. The district court granted summary judgment for the town and police department, reasoning that the officers' claims concerned the terms of the contract, but were "gussied up as a statutory claim" to invoke *Wright* and avoid arbitration without a "clear and unmistakable" waiver of a judicial forum. The First Circuit reversed, explaining that even though the facts giving rise to the officers' claims concerned both the terms of the contract and the statute, the statutory claim did not "merge" into a contractual claim. Therefore, under *Wright*, a "clear and unmistakable" waiver of a judicial forum was necessary to bind the officers to arbitration of their FLSA claim. Because no clear and unmistakable waiver was present, summary judgment on this ground was improper.

Supreme Court Case: *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)

Waffle House involved an employee who entered an arbitration agreement with his employer. The employee was terminated after experiencing a seizure at work. Rather than arbitrating his claim, the employee filed a charge of discrimination with the EEOC, alleging an ADA violation. After an investigation, the EEOC filed an enforcement action against Waffle House in federal court, requesting injunctive relief as well as "victim-specific" relief, such as back pay, reinstatement, compensatory damages, and punitive damages for the former employee. Waffle House motioned to stay the EEOC's suit to compel arbitration, pursuant to its agreement with the former employee. After the district court denied the motion, the Court of Appeals determined that because the EEOC was not a party to the arbitration agreement, and because it has independent statutory authority to bring suit, the EEOC could pursue injunctive relief as this remedy is meant to further the public interest. However, because of federal policy favoring arbitration agreements, the court held that the EEOC could not seek victim-specific relief for the employee's

private benefit. The Supreme Court reversed, holding that the EEOC may seek both an injunction and victim-specific relief. When the EEOC files suit on its own, the employee has no independent cause of action, and the EEOC is not representing the employee. The EEOC, as a public agency, may determine that public resources should be used to obtain victim-specific relief. Further, the EEOC cannot be forced to arbitrate when it has not contracted to do so, merely because two other parties have entered a contract following the general rule that, "A contract cannot bind a nonparty." The Court also noted that nothing in the EEOC's statutory authority limits its ability to seek victim-specific relief.

Query: Is it strange that *Wright* was not mentioned in this decision?

Subsequent Interpretation by Lower Courts:

- *EEOC v. Woodmen of the World Life Ins. Society*, 479 F.3d 561 (8th Cir. 2007)

In a case involving sexual harassment and not the ADA, an employee whose contract with her employer included an arbitration agreement, filed a charge of sex discrimination with the EEOC. The EEOC filed a claim in federal court against the employer, and the employee moved to intervene and file a cross-claim against the employer. The employer then motioned to compel the employee to arbitrate her individual claim, pursuant to the arbitration agreement. The district court allowed the employee to remain in the federal court case. On appeal, the Eighth Circuit, relying on *Waffle House*, reversed. The employee relied on the statement in *Waffle House* that once the EEOC files suit, "an employee has no independent cause of action, although the employee may intervene in the EEOC's suit" to suggest that she no longer had a claim to pursue in arbitration, and her only means of remedy was to intervene in the EEOC's federal case. The Eighth Circuit rejected this interpretation of *Waffle House*. It noted that the Court in *Waffle House* goes on to explain, "the EEOC has the authority to pursue victim-specific relief regardless of the forum that the employer

Impact of the Supreme Court's ADA Decisions

and employee have chosen to resolve their disputes." The Eighth Circuit reasoned that, "Had the Supreme Court intended to preclude an employee from asserting claims in arbitration against the employer concurrently with the EEOC enforcement action," it would have no reason to discuss the possible forums in which the employer and employee will resolve the employee's individual claim.

Supreme Court Case: *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)

Clackamas involved a medical clinic employee, Deborah Wells, who worked for a small health care provider. After Ms. Wells was terminated, she sued the clinic, alleging discrimination on the basis of disability, in violation of Title I of the ADA. The clinic argued that it was not subject to Title I of the ADA because it did not have the requisite 15 or more employees for 20 weeks of the year, as required by the ADA. Whether or not the clinic in fact had 15 employees turned on whether four physician-shareholders who owned the professional corporation and constituted its board of directors were "employees." The Supreme Court noted that the ADA only states that an "employee" is "an individual employed by an employer." Not finding this definition helpful, the Court then turned to the common law definition of the master-servant relationship. Under that analysis, whether or not an individual is an employee turns on the "master's" level of control over the individual. In determining an organization's level of control over an individual, the Court endorsed six factors considered by the EEOC:

1. "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work"
2. Whether and, if so, to what extent the organization supervises the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in

written agreements or contracts; and

6. Whether the individual shares in the profits, losses, and liabilities of the organization."

While noting that in this case some of the factors weigh in favor of the conclusion that the physicians are not employees, the Court remanded the case, explaining that there may be evidence in the record weighing in the opposite direction. The Court noted that some facts indicate the physician/shareholder/directors are not employees, such as: They control the operation of their clinic; share the profits; and are personally liable for malpractice claims. On the other hand, the physician/shareholder/directors: Receive salaries; must comply with the clinic standards & report to personnel manager; admit are "employees" under ERISA (prime reason for being a P.C.) and state worker's compensation laws; and have employment contracts (and can be terminated). For these reasons, the court held that further review by the lower court was appropriate.

Note: See, DBTAC: Great Lakes Center Webinar on Employer Defenses

Subsequent Interpretation by Lower Courts:

- *De Jesus v. LTT Card Servs., Inc.*, 474 F.3d 16 (1st Cir. 2007)

In *De Jesus*, an employer sued her employer under Title I for disability harassment and creating a hostile work environment leading to constructive discharge. The employer moved for summary judgment on the ground that it did not have 15 or more employees. The district court granted the employer's motion. However the First Circuit reversed, relying on the six-factor test adopted in *Clackamas*. Similar to *Clackamas*, the number of employees in this case turned on whether two shareholder-directors constituted employees for purposes of the ADA. The court noted that the district court dismissed the employee's claim while seemingly relying only on the disputed individuals' roles as shareholder-directors and the fact that they were not listed employees on the company payroll. Under *Clackamas*, however, a court must examine the six factors to determine the employer's level of control over the individuals. Managerial or supervisory authority is not

Impact of the Supreme Court's ADA Decisions

dispositive on the issue of whether or not an individual is an employee for purposes of the ADA. Because the district court did not give weight to the six factors, the First Circuit reversed and remanded the case.

Supreme Court Case: Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)

Plaintiffs, two state employees with disabilities, filed suit alleging that the state discriminated against them in violation of the ADA. Patricia Garrett worked as a registered nurse. After undergoing treatment for breast cancer, she returned to work and was required to give up her position as a director. Milton Ash worked as a security officer for the Alabama Department of Youth Services. He requested a modification of his duties to minimize his exposure to carbon monoxide and cigarette smoke due to asthma. He also requested to work on the dayshift to accommodate his sleep apnea. The Department refused to provide these accommodations. Both plaintiffs filed suit under the ADA.

In defending against these claims, the State argued that the ADA exceeded Congress' authority to abrogate the Eleventh Amendment immunity. 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 district court found that there was immunity and granted summary judgment to the state. The Eleventh Circuit Court of Appeals reversed the decision. When it reached the Supreme Court, the Court held that the Eleventh Amendment bars suits in federal court by state employees for money damages under Title I of the ADA. The Court found that the ADA's legislative record failed to show a history and pattern of irrational employment discrimination by the states against people with disabilities. Such a history is necessary to justify a waiver of sovereign immunity. However, the Court held that the Eleventh Amendment does not bar

injunctive relief and that state employees are permitted to bring suits against the state seeking injunctive (non-monetary) relief such as reasonable accommodation.

Justice Breyer wrote a dissent, which Justices Stevens, Souter and Ginsburg joined. The dissent described the vast legislative record about the mass, society-wide discrimination against individuals with disabilities, which the majority had discounted as not specific to State employment practices. The dissent noted that there is no reason to believe that State governments are insulated from this type of discriminatory practice. The dissent also stated that there are roughly 300 examples of discrimination by state governments themselves in the legislative record, so it fails to see how this evidence "fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which... legislation must be based."

A non-ADA Supreme Court Case Involving the Eleventh Amendment: Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, (2003)

In a non-ADA case arising under the Eleventh Amendment, William Hibbs, an employee at the Nevada Department of Human Resources, sought unpaid leave under the Family and Medical Leave Act (FMLA) to care for his ailing wife. The Department granted Hibbs' request for twelve weeks of leave, the amount statutorily allotted. Once Hibbs' leave expired, the state informed Hibbs of his return to work date. Hibbs failed to report to work on that date, and the state terminated his employment. Hibbs sued the state for equitable and money damages under the FMLA. The district court granted summary judgment to the state, finding the Eleventh Amendment barred FMLA claims under *Garrett*. The Ninth Circuit reversed this finding. The Supreme Court affirmed the Circuit Court's decision, holding that state employees may recover money damages in federal court for a state's failure to comply with the FMLA. The Court explained that Congress abrogated the states' Eleventh Amendment immunity because it clearly and unmistakably expressed its intention to do so. The Court also found that Congress had the

Impact of the Supreme Court's ADA Decisions

authority to do so, given the significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the states. The Court relied on Congress' finding that employers often hired men to avoid leave obligations and sought to eliminate this stereotype. In distinguishing similar cases, like *Garrett*, the Court emphasized that a greater level of scrutiny governs determinations about sex. The Court also distinguished *Garrett* by finding the FMLA to be narrowly targeted and affect only one aspect of the employment relationship. It also noted the significance of the FMLA's limitations; specifically, the fact that the FMLA provides only unpaid leave; applies to employees who have worked at the employer for at least one year; and does not apply to employees in high-ranking or sensitive positions.

Queries:

- Does the Eleventh Amendment distinguish between claims for injunctive relief and money damages?
- Is there a clearer history of discrimination in *Hibbs* than there is in *Garrett*?
- Are the two cases really distinguishable?

Title II of the ADA

Subsequent Interpretation by Lower Courts:

- ***Darcy v. Lippman*, 2009 WL 3416168 (2d Cir. 2009)**

Based on *Garrett*, the Second Circuit stated that the Eleventh Amendment bars plaintiff's ADA claims seeking monetary damages from New York State and the state's Unified Court System. It stated that the ADA does not abrogate state sovereign immunity. The Second Circuit continued by stating that plaintiff cannot pursue a claim for damages against defendants in their personal capacities because this is not allowed under the ADA.

Supreme Court Case: *Olmstead v. L.C.*, 527 U.S. 581 (1999)

Olmstead involved two women with mental retardation and mental illness who were patients at a state-operated hospital in Georgia. Although state treatment professionals for both women had deemed them appropriate for community-based placements, both remained in institutions. They filed suit under Title II of the ADA alleging that the state had violated the ADA's integration mandate. The integration mandate was based on Title II Regulations promulgated by the Department of Justice. These regulations provided that state and local governments must provide their services to people with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, and make reasonable modifications in the services it provides unless those modifications would result in a fundamental alteration. The Supreme Court held that the unwarranted institutionalization of people with disabilities is a form of discrimination that is actionable under the ADA. The Court ruled that the ADA requires states to serve people with disabilities in community settings, rather than in segregated institutions, when three factors are present:

1. Treatment professionals determine community placement is appropriate;
2. The person does not oppose community placement; and
3. The placement can be reasonably accommodated taking into account the resources available to the state and the needs of others who are receiving state-supported services.

The Court also held that a state can meet its obligations by creating a comprehensive, effectively working plan for evaluating and placing people with disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace and that is not controlled by the state's endeavors to keep its institutions fully populated. The Court noted that a state can rely on the fundamental-alteration defense by showing that in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the state's responsibility for the care and treatment of a large

Impact of the Supreme Court's ADA Decisions

and diverse population of persons with mental disabilities.

Subsequent Interpretations by Lower Courts:

a. People at Risk of Institutionalization

The Supreme Court's decision in *Olmstead* demonstrated the broad reach of the ADA and the importance of the "integration mandate." Although *Olmstead* involved plaintiffs in institutions, the decision has also been applied to people who are "at risk of institutionalization."

- ***G. v. Hawaii*, 2009 WL 5061742 (D. Hawaii Dec. 24, 2009)**

Plaintiffs are eleven Medicaid beneficiaries who are part of the aged, blind, and population of people with disabilities. Plaintiffs alleged that under the State's former fee-for-service system, the State placed qualified individuals with disabilities in the community with requisite services to enable integration. However, the State's new system reduces their access to such services, causing them to be at greater risk of institutionalization. The court granted defendant's motion for summary judgment for ten of the plaintiffs, finding that they failed to present evidence that they would be at risk of institutionalization. However, the court denied defendant's motion for summary judgment for one plaintiff, finding him to be at risk of institutionalization because he has experienced long running problems with securing payment for his community aids. The court found this sufficient to establish a question of fact as to whether he was suffering an imminent risk of reduction in services and whether he would have to be institutionalized as a result.

- ***V.L. v. Wagner*, 2009 WL 3486708 (N.D. Cal. Oct. 23, 2009)**

Plaintiffs are Californians who have disabilities and are elderly and who need in-home assistance with one or more of the activities of daily living, such as eating, bathing, toileting or taking medication, in order to live safely at home without risk of serious injury or harm. Plaintiffs sought to prevent California from applying a change in the law to reduce or terminate services from the state In-Home Supportive Services (IHSS) program. The

State was planning to change the program's eligibility criteria to reduce or terminate services to recipients. The court granted plaintiffs' requested preliminary injunction. It found the plaintiffs will likely be successful on the merits because they submitted substantial evidence from experts, county officials, caregivers and individual recipients showing that class members face a severe risk of institutionalization as a result of losing the services. Specifically, individuals with mental disabilities who lose assistance to remind them to take medication, attend medical appointments and perform tasks essential to their continued health are at a severely increased risk for institutionalization. Further, elderly and disabled individuals with unmet in-home care needs will likely suffer falls, which will lead to hospitalization and subsequent institutionalization. Elderly individuals who lose meal preparation services will decline in health and risk being placed in a nursing home. Defendants argued that some plaintiffs are not at risk of institutionalization because they have family members who could take over the care once provided by IHSS and others might find care through some other community-based service. The court rejected this argument stating that defendants bear the ultimate responsibility for ensuring the State's compliance with federal disability law. In addition, the record demonstrated that alternative services were not available for a large portion of the class members who faced the risk of institutionalization.

- ***Crabtree v. Goetz*, 2008 WL 5330506 (M.D. Tenn. Dec. 19, 2008)**

Twenty-two adults with disabilities who were receiving substantial or full-time nursing care sued the State of Tennessee for significantly cutting funding for home health care services. They sued under Title II of the ADA and Section 504 of the Rehabilitation Act, arguing that due to funding cuts, plaintiffs would be forced out of their homes and into institutions. The court concluded that the State's cuts would cause plaintiffs to become institutionalized in nursing homes. The court granted a preliminary injunction to the group members to prevent the State from instituting the cuts until: a) a community-based, person-centered system was implemented; b) individualized assessments of the group members were conducted to determine their specific needs; and c)

Impact of the Supreme Court's ADA Decisions

determinations were made whether nursing homes could provide the services the group members needed.

- ***Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003)**

The court acknowledged that adults with developmental disabilities who were living with their parents, but waiting for community services, were covered by the *Olmstead* decision.

- ***Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003)**

The court held that the integration mandate's protections are not limited to people who currently are institutionalized and that persons "who, by reason of a change in state policy, stand imperiled with segregation," may challenge that policy under the integration mandate.

b. Comprehensive Effectively Working Plan

As noted above, the Supreme Court stated in *Olmstead* that a state could be deemed to have met the integration mandate if it had a "comprehensive effectively working plan."

- ***Disability Advocates, Inc. v. Paterson*, 2009 WL 2872833 (E.D.N.Y. Sept. 8, 2009)**

Suit was brought against the State of New York on behalf of residents with mental illness living in large private state-funded facilities. The suit sought to require New York to provide more community living opportunities under the integration mandate of Title II and *Olmstead*. After a trial, the district court found that New York violated the ADA and Rehabilitation Act by segregating 4,300 people with mental illness. The court found this to be so, despite the fact that the facilities were located in residential neighborhoods and allowed residents to come and go, albeit with some restrictions. The court explained that the facilities were designed to manage and control large numbers of residents, and thus established inflexible routines that limited personal autonomy, housed more than 100 persons with disabilities, and did not enable residents to interact with non-disabled persons to the fullest extent possible. The court further noted

that a plan to integrate individuals with disabilities into community-based supported housing must, at a bare minimum, specify four things to comply with the integration mandate of ADA and Rehabilitation Act: 1) the time frame or target date for placement in a more integrated setting; 2) the approximate number of patients to be placed each time period; 3) the eligibility for placement; and 4) a general description of the collaboration required between the local authorities and the housing, transportation, care and education agencies to effectuate integration into the community.

- ***Crabtree v. Goetz*, 2008 WL 5330506 (M.D. Tenn. Dec. 19, 2008)**

Twenty-two adults with disabilities who were receiving substantial or full-time nursing care sued the State of Tennessee for significantly cutting funding for home health care services. They sued under Title II of the ADA and Section 504 of the Rehabilitation Act, arguing that due to funding cuts, plaintiffs would be forced out of their homes and into institutions. The court held that the State had not developed the comprehensive effectively working plan discussed in the Supreme Court's *Olmstead* decision. Although the State passed a law with a proposed comprehensive plan, the Act was not operational and lacked a projected date for implementation. The court also questioned whether such a plan would be deemed effective given the problems with the State's healthcare structure and past performance. It cited various other court opinions that found other state's working plans to be effective.

- ***G. v. Hawaii*, 2009 WL 5061742 (D. Hawaii Dec. 24, 2009).**

Although the State had a comprehensive deinstitutionalization plan that worked to some extent, the court found a question of fact as to whether the plan is working "effectively," given that it might not be working for the plaintiff in this case.

c. Fundamental Alteration

The Supreme Court held that states must make reasonable modifications to the services it provides unless those modifications would result in a fundamental alteration. Many cases have turned on whether the plaintiffs' requested relief would be a fundamental alteration.

Impact of the Supreme Court's ADA Decisions

- ***Radaszewski ex rel. Radaszewski v. Maram*, 2008 WL 2097382 (N.D. Ill. March 26, 2008).**

A young man with significant disabilities sought to receive nursing services in his home rather than in an institution. He had been receiving these services as a minor, but once he turned 21, he was no longer eligible for that program. At age 21, he became eligible for the Home Services Program (HSP). Unfortunately, HSP did not provide the number of in-home nursing services that the plaintiff required and the State took the position that it could only serve him in a nursing home. The State claimed that to serve him in his home was a fundamental alteration of its programs not required under the law. In 2004, the Seventh Circuit rejected the State's position and found that there was no fundamental alteration since the State already provided this service, just not at the level requested. The court found that the plaintiff's case was even stronger based on evidence that it would be less expensive for the State to serve the plaintiff in his home rather than in a nursing home. On remand, the district court found that providing in-home services would not fundamentally alter the nature of its program and services. **See also *Grooms v. Maram*, 563 F.Supp.2d 840 (N.D. Ill. 2008); and *Sidell v. Maram*, 2007 WL 5396285 (C.D. Ill. May 14, 2007).**

- ***Crabtree v. Goetz*, 2008 WL 5330506 (M.D. Tenn. Dec. 19, 2008)**

Twenty-two adults with disabilities who were receiving substantial or full-time nursing care sued the State of Tennessee for significantly cutting funding for home health care services. They sued under Title II of the ADA and Section 504 of the Rehabilitation Act, arguing that due to funding cuts, plaintiffs would be forced out of their homes and into institutions. The State argued that providing requested care would be a fundamental alteration, and the court disagreed. The court identified three factors to consider whether the fundamental alteration defense arises: 1) State's ability to continue meeting the needs of other institutionalized mental health patients for whom community placement is not appropriate; 2) whether the State has a waiting list for community placements; and 3) whether the state has a developed a comprehensive plan to move eligible

patients into community care settings. The State did not show that the expenditures of home health services threaten individuals in nursing homes, because State relies heavily on nursing home care. Although the State enacted a new law creating a waiting list and comprehensive plan, it has not yet been implemented.

- ***Messier v. Southbury Training School (STS)*, 562 F.Supp.2d 294 (D. Conn. 2008)**

Plaintiffs are a class of individuals with intellectual disabilities who are STS residents, might become STS residents, or have been transferred from STS but still are under its control. Plaintiffs contend that defendants failed to adequately evaluate all class members to see if they are appropriate for community placement and failed to place such members in the community. Defendants argued that this is a fundamental alteration, but the court rejected that claim. The court noted that it is unlikely that "massive" or "gigantic" changes will result from ordering the State to exercise professional judgment in considering whether class members are qualified for community placements and then in placing them in such. Because the State has made a public commitment to further enhance its system of community placements, the court rejected its argument that placement in the community is a fundamental alteration.

- ***Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151 (3rd Cir. 2005)**

Plaintiffs are a class of individuals who are of a state psychiatric hospital. Plaintiffs challenged the State's compliance with the court mandate to "develop a plan for future de-institutionalization of qualified disabled persons that commits it to action in a manner for which it can be held accountable by the courts." Plaintiffs argued that the State failed to provide "concrete, measurable benchmarks and a reasonable timeline for them to ascertain when, if ever, they will be discharged to appropriate community services." In contrast, the State argued that all it had to do was "demonstrate 'a commitment to take all reasonable steps to continue [its past] progress'" in order to satisfy the fundamental alteration defense. The court interpreted *Olmstead* "to mean that a comprehensive working plan is a necessary component of a successful 'fundamental alteration'

Impact of the Supreme Court's ADA Decisions

defense.” In this case, the State’s efforts were insufficient to demonstrate “a reasonably specific and measurable commitment to de-institutionalization for which DPW may be held accountable.” The court then provided specifics, stating that at a bare minimum, a comprehensive, effectively working plan should: “specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.”

- ***Arc of Washington v. Braddock*, 427 F.3d 615 (9th Cir. 2005)**

In *Braddock*, plaintiffs sued Washington state officials for failing to provide sufficient community services under its Home and Community Based Services Medicaid waiver program. The 9th Circuit held that Washington demonstrated that it has a “comprehensive effectively working plan” as contemplated by *Olmstead*, and therefore were not in violation of the ADA. Specifically, the court found: Washington’s HCBS program (1) is sizeable, with a cap that has increased substantially over the past two decades; (2) is full; (3) is available to all Medicaid-eligible disabled persons as slots become available, based only on their mental-health needs and position on the waiting list; (4) has already significantly reduced the size of the state’s institutionalized population; and (5) has experienced budget growth in line with, or exceeding, other state agencies. Under such circumstances, forcing the state to apply for an increase in its Medicaid waiver program cap constitutes a fundamental alteration, and is not required by the ADA.

Supreme Court Case: *State of Tennessee v. Lane*, 541 U.S. 509 (2004)

Plaintiffs, two Tennessee residents with paraplegia, were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators. One of the plaintiffs, Beverly Jones, sought access to the courtroom to perform her work as a court reporter. The other plaintiff, George Lane, was unable to attend a criminal

proceeding being held in an inaccessible second-floor courtroom. The State of Tennessee arrested him for failure to appear when he refused to crawl or be carried up the steps. Lane and Jones filed suit under Title II of the ADA to challenge the State’s failure to hold proceedings in accessible courthouses. In response to the ADA suit, the State of Tennessee argued that it is immune from suits under Title II of the ADA due to the 11th Amendment. The plaintiffs argued that, at the very least, the Supreme Court’s decision in *Garrett*, stating that states are subject to claims for injunctive relief under Title I of the ADA, should be extended to Title II. The plaintiffs also contended that there is a stronger history of discrimination by states under Title II and therefore, states should not be immune from suits for money damages.

The Court held that Title II appropriately abrogated state sovereign immunity such that states are subject to lawsuits filed in federal court for money damages under the ADA in cases involving access to the courts. The Court found that in enacting Title II, Congress relied on the extensive history of discrimination by states in the provision of its programs and services for people with disabilities. The Court went on to hold that the remedies set forth by Congress in the ADA were appropriate to address the objective of enforcing access to the courts for people with disabilities, which included money damage. While the Court limited its holding to cases involving access to courts, its analysis documents the history of state-sponsored discrimination against people with disabilities in many different areas, including voting, education, institutionalization, marriage and family rights, prisoners’ rights, access to courts, zoning restrictions.

Query: Does the Supreme Court’s decision that money damages are available against states under Title II but not Title I make sense?

Note: At Oral Argument, Justice Scalia seemed to say that Lane should have asked someone to carry him up the stairs. He asked if it would be a constitutional violation if the State said, “we’ll see that you are carried up by... constables.” Would carrying someone up the stairs be an acceptable means of access?

Impact of the Supreme Court's ADA Decisions

Subsequent Interpretations by Lower Courts:

a. Licensing

- **Brewer v. Wisconsin Board of Bar Examiners**, 270 Fed.Appx. 418 (7th Cir. 2008)

Plaintiff graduated from the University of Wisconsin Law School and disclosed on her Wisconsin Bar application that the Social Security Administration had found her to be disabled. Based on this, the Board directed plaintiff to undergo and pay for a \$2,000 psychological evaluation. Plaintiff refused, but offered to provide affidavits from her former employers and professors attesting to her fitness to practice. The Board rejected this alternative and declined to act on her application. Plaintiff sued under the ADA and various constitutional provisions. Based on *Lane*, the Seventh Circuit found that the Board was immune from suit because the ADA did not abrogate state immunity for claims challenging attorney-licensing practices. She did not argue that Congress identified a history and pattern of unconstitutional discrimination against people with disabilities in the administration of attorney-licensing schemes.

b. Peremptory Challenges to Jury Duty

- **United States v. Watson**, 483 F.3d 828 (D.C. Cir. 2007)

During jury selection in a criminal case, the prosecutor exercised two of its peremptory challenges to strike the jurors who were blind due to the prosecutor's heavy reliance on visual materials. Before the D.C. Circuit, the issue was whether the prosecutor's peremptory challenge of two potential jurors with visual impairments was lawful. Watson argued that, under *Lane*, jury service is a fundamental right, so a heightened scrutiny of peremptory challenges, like the ones that already exist on the basis of race, should apply. The D.C. Circuit disagreed, holding that classifications based on disability are constitutional if they are rational, and in this case, the prosecutor's explanation was rational. It explained that the Supreme Court in *Lane* referenced absolute bars to jury service and discretionary bars invoked by trial judges, but does not apply to the

exercise of peremptory challenges of individual jurors on the basis of disability.

Supreme Court Case: *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998)

Ronald Yeskey was sentenced to 18 to 36 months in a Pennsylvania correctional facility. However, it was recommended that he participate in a Motivational Boot Camp for first-time offenders instead of serving jail time. If Yeskey successfully completed this program, he would be eligible for parole after just six months. However, the State refused Yeskey's admission into the Boot Camp due to his history of hypertension. Yeskey filed suit under the ADA. The issue before the Supreme Court was whether Title II of the ADA applied to inmates in state prisons; the Court found that it did. The Court found it "unmistakably clear" that state prisons fall within the statutory definition of "public entity." The Court rejected the State's contention that prisoners do not "benefit" from prison services or participate in them voluntarily so they fall outside the scope of the ADA. Perhaps most notably, the Court overruled the State's argument that the ADA's finding and purpose did not specifically mention prisons. The Court opined that the inclusion of the word "institutionalization" could include penal institutions, and then held that the ADA can be applied to situations not expressly anticipated by Congress.

Recent Interpretation by Lower Courts:

Frame v. City of Arlington, 575 F.3d 432 (5th Cir. 2009)

Plaintiffs alleged that the City of Arlington violated the ADA and Rehabilitation Act by failing to make the City's curbs, sidewalks accessible for persons with disabilities. In deciding whether sidewalks are a service, program or activity within the meaning of Title II, the Fifth Circuit cited *Yeskey*. It found that "services, programs, or activities is at least broad enough to include curbs, sidewalks, and parking lots."

See also, *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002) (citing *Yeskey* to find that Title II's application to "services, programs, or activities" can be construed as "anything a public entity does.").

Impact of the Supreme Court's ADA Decisions

Supreme Court Case: *United States v. Georgia*, 546 U.S. 151 (2006)

Tony Goodman was an inmate with paraplegia in the Georgia prison system. He filed a *pro se* complaint in federal court challenging the conditions of his confinement. Defendants included the State of Georgia, Georgia Department of Corrections, and individual prison officials. Goodman sought injunctive relief and monetary damages against all defendants. Among other complaints, Goodman alleged that he was confined for 23-24 hours a day in a 12x3 foot cell in which he could not turn his wheelchair around; he was forced to sit in his own feces and urine while prison officials refused to assist him; and he was denied physical therapy and medical treatment. At the appellate level, the Eleventh Circuit Court of Appeals found that these three allegations were potentially Eighth Amendment violations and gave him leave to amend his complaint to sufficiently allege them. The Eleventh Circuit also found Goodman's claims for money damages against the State were barred by sovereign immunity, and this issue was appealed to the Supreme Court. The Court held that the ADA abrogated state sovereign immunity, allowing inmates to recover monetary damages when they suffer actual violations of the Fourteenth Amendment. The Court then remanded the case for the lower courts to determine if any of Goodman's claims violated Title II of the ADA; whether his claims also violated the Fourteenth Amendment; and then if misconduct violated Title II but not the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that conduct was nevertheless valid.

Query: How does this decision compare with *Garrett* and *Lane*?

Subsequent Interpretations by Lower Courts:

a. Prisons

- *Mingus v. Butler*, --- F.3d ---, 2010 WL 99 (6th Cir. Jan. 5, 2010)

A prisoner brought a claim under the ADA, Rehabilitation Act, and the Eighth and Fourteenth

Amendment. The district court denied defendant's motion for summary judgment on grounds of sovereign immunity. In this case, a prisoner with macular degeneration and other physical disabilities argued that there was no rational basis for finding prisoners without disabilities or those with less serious medical problems, were qualified for a single-occupancy room, but plaintiff was not. The prisoner also alleged this to be a violation of the ADA and Rehabilitation Act because defendant treated him differently than similarly situated prisoners. The Sixth Circuit outlined the three-part test established in *Georgia* and noted that the district court failed to apply the test. The Sixth Circuit found that the plaintiff alleged that the same misconduct violated the Fourteenth Amendment and ADA independently. Because of this, the court had no reason to determine whether sovereign immunity is at issue, and affirmed the district court's decision.

b. Education

- *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006)

Plaintiff, a student at the University of Puerto Rico with schizoaffective disorder, brought an action under Title II of the ADA alleging that the University and various University officials discriminated against him on the basis of his disability and failed to reasonably accommodate his disability. Before the First Circuit, the issue was whether plaintiff could sue the University for damages or whether the doctrine of sovereign immunity precluded such a suit. The First Circuit noted that, based on *Georgia*, it must determine "on a claim-by-claim basis, (1) which aspects of the state's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." It concluded that Title II, as it applies to cases implicating the right of access to public education, lawfully abrogated sovereign immunity. Therefore, state sovereign immunity is not a defense to this action.

See also *Bowers v. National Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007); *Ass'n for*

Impact of the Supreme Court's ADA Decisions

Disabled Americans v. Fla. Int'l Univ., 405 F.3d 954 (11th Cir. 2005); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) (finding Congressional abrogation of sovereign immunity with respect to public education to be valid).

Supreme Court Case: *Barnes v. Gorman*, 536 U.S. 181 (2002)

Jeffrey Gorman, an individual with paraplegia who used a wheelchair, was arrested for trespass. Gorman was injured while being transported in a police van that was not equipped with wheelchair restraints. He sued the Kansas City Board of Police Commissioners for discrimination on the basis of his disability pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act. A jury awarded both compensatory and punitive damages, but the district court vacated the punitive damages award, holding that punitive damages were not available under the statutes. The Supreme Court similarly held that punitive damages are not available under Title II or Section 504. It explained that by the terms of the two statutes, the available remedies are the same as those available under Title VI of the Civil Rights Act of 1964. Title VI invokes Congress' power under the Spending Clause to place conditions on the receipt of federal funds, and has been analogized to a contract between Congress and the party receiving the funds. (Congress agrees to provide funds in exchange for the recipient's promise to comply with federally imposed conditions.) The remedies available under Title VI are therefore generally the same as those available under contract law. Punitive damages are generally unavailable for breach of contract, and are therefore unavailable for Title VI violations. Thus, punitive damages are not available under

Subsequent Interpretation by Lower Courts:

- *Sheely v. MRI Radiology Network*, 505 F.3d 1173 (11th Cir. 2007)

In *Sheely*, an individual who was blind sued a facility owner under Title II of the ADA and Section 504 of the Rehabilitation Act, when the owner did not allow her to bring her service dog past a waiting room area to accompany her minor child to an MRI appointment. The individual sought compensatory damages for emotional distress under Section 504. The district court granted summary judgment for the facility owner, holding that emotional damages are not available for intentional violations of Section 504. The Eleventh Circuit reversed, relying on the Supreme Court's reasoning in *Barnes*, in which the Court analogized ADA and Rehab Act claims to contract law. The court explained that *Barnes'* reliance on the contract analogy is concerned with ensuring that federal funding recipients have fair notice of their potential liability for "breach." Because an obvious, frequent consequence of discrimination is the emotional distress of the victim, this is a foreseeable result, and recipients who "breach the contract" have fair notice that they may be liable for emotional damages. Emotional damages, like other compensatory damages, are meant to make the plaintiff whole, and are therefore within the contract analogy used in *Barnes*. While emotional damages are not typically available for breach of most contracts, they are available "when the nature of the contract is such that emotional distress is foreseeable."

Supreme Court Case: *Bragdon v. Abbott*, 524 U.S. 624 (1998)

The first ADA case heard by the Supreme Court was the *Bragdon* case, arising under Title III of the ADA. In *Bragdon*, a dentist refused to fill a patient's cavity in his office because the patient disclosed that she had asymptomatic HIV. The patient sued, alleging discrimination on the basis of her disability in violation of Title III of the ADA. The Supreme Court held that HIV, even in its asymptomatic stage, constitutes a disability within the meaning of the ADA, because it substantially limits a major life activity. Specifically, the Court determined that:

Title III of the ADA

Title II of the ADA or Section 504 of the Rehabilitation Act.

Impact of the Supreme Court's ADA Decisions

1. Asymptomatic HIV constitutes an impairment;
2. Reproduction is a major life activity; and
3. Bragdon's HIV substantially limited her in the major life activity of reproduction, because a woman with HIV who attempts to conceive a child risks infecting her male partner as well as the child.

The Court took note of Bragdon's testimony that her HIV controlled her decision not to have a child and that several agencies and other courts that have consistently found HIV to constitute a disability under either the ADA or Rehabilitation Act. The Court next addressed the dentist's defense that treating someone with HIV would have posed a direct threat to the health and safety of others. It explained that whether a direct threat existed must be determined from the standpoint of the person who refused the treatment, but that the risk assessment must be based on the best available medical or other objective evidence. The Court ultimately remanded the issue of whether sufficient evidence was presented to raise a triable issue of material fact on the significance of the risk that existed.

Subsequent Interpretations by Lower Courts:

- ***EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438 (7th Cir. 2008)**

In this case, the EEOC alleged that an employer violated the ADA when it failed to hire an individual because she was HIV-positive. In response to the employer's motion for summary judgment, the EEOC for the first time argued that the individual had AIDS, and provided affidavits from the individual and her physician, describing the impact that AIDS had on her major life activities. The court found that, according to *Bragdon*, HIV and AIDS are not synonymous for purposes of the ADA. As the EEOC's attempt to refashion its claim came too late in the litigation, the district court disregarded the affidavits that described the effect of AIDS on the individual's major life activities. Therefore, the record contained no evidence that HIV, the original disability alleged by the EEOC, substantially limited the individual's major life activities. As a result, the individual could not be considered to

have a disability within the meaning of the ADA, and the court granted summary judgment for the employer. The Seventh Circuit affirmed, explaining that the district court was entitled to regard the EEOC's altered claim as "too late." The court also explained that under *Bragdon*, whether an individual who is HIV positive is "disabled" under the ADA requires an individualized analysis. The Court in *Bragdon* did not address whether HIV is a per se disability under the ADA, and the Seventh Circuit declined to make such a broad ruling in this case.

- ***Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378 (3rd Cir. 2004)**

Fiscus involved an employee at Wal-Mart with end-stage renal disease. As a result of this condition, which causes near-total kidney failure, Ms. Fiscus underwent dialysis treatments to cleanse and eliminate waste from her blood. She requested a reasonable accommodation from Wal-Mart, but was denied. Ms. Fiscus was therefore placed on disability leave. When she was unable to return to work at the expiration of her leave period, she was fired. In response to the employee's complaint of disability discrimination in violation of the ADA, Wal-Mart argued that the employee's end-stage renal disease did not substantially limit a major life activity, and therefore could not constitute a disability for purposes of the ADA. The district court agreed, and granted summary judgment for Wal-Mart. The Third Circuit reversed, finding that the employee's renal disease substantially limited her ability to cleanse her blood and eliminate body waste, which constituted "major life activities." In determining that cleansing blood and processing waste were major life activities, the court relied on *Bragdon*. In determining that reproduction is a major life activity, the *Bragdon* Court dismissed any difference for purposes of the ADA between internal, autonomous physical activities and external, volitional physical activities. Further, *Bragdon* required no showing that reproduction is a recurrent or daily feature of life. The important question was not the frequency of the activity, but its importance to the life of the individual. By this standard, processing and eliminating waste from the blood qualifies as a major life activity. It is normally an internal, non-volitional process, but is obviously "central to

Impact of the Supreme Court's ADA Decisions

the life process,” because in its absence an individual will die.

Note: Is sexual activity a major life activity apart from reproduction? See, e.g., *McAlindin v. County of San Diego*, 193 F. 3d 1226 (9th Cir. 1999) (Engaging in sexual relations is a major life activity apart from reproduction.); *Commman v. N.P. Dodge Mgmt.*, 43 F. Supp. 2d 1066 (D. Minn. 1999) (A person who is a breast cancer survivor is covered as our society considers a woman's breasts to be an integral part of her sexuality.); *Christner v. American Eagle Airlines, Inc.*, 2003 WL 21267105 (N.D. Ill. May 30, 2003) (unreported) (Being prevented from having sexual relations in “certain positions” due to an inability to bend one's arms is not a substantial limitation.)

Note: Bragdon and other cases discussed in this section were originally filed before the ADA Amendments Act (ADAAA) became law. The ADAAA may result in a different outcome.

Supreme Court Case: *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001)

Casey Martin, a professional golfer and former teammate of Tiger Woods at Stanford, has a significant circulatory disorder obstructing the flow of blood to his right leg. As a result, he could not walk an 18-hole golf course, and therefore required a golf cart in order to compete. When the PGA tour denied his request to use a cart, citing its walking rule for most professional tournaments, Martin sued, alleging discrimination on the basis of his disability, pursuant to Title III of the ADA.

The Supreme Court reviewed, as a threshold matter, whether the PGA's golf tour events constitute a “public accommodation,” and are therefore subject to Title III. The PGA argued that Title III is concerned only with discrimination against “clients and customers” who seek “goods and services” at a place of public accommodation. Therefore, it applies only to golf spectators, not professional golfers competing in tournaments. The Court rejected this argument, explaining that even if Title III only applies to “clients and customers,” golfers who pay a \$3,000 fee for the chance to compete in tour events are as much “clients or customers” as are the spectators who

pay to watch tour events. Under Title III, the PGA must not discriminate against either spectators or competitors.

The Court next addressed whether Title III was violated in this case. While admitting that allowing Martin to use a cart would be a reasonable modification to its policies, the PGA argued that it was nonetheless not required to provide a cart under Title III because such a modification would “fundamentally alter the nature” of PGA events. The Court did not agree and held that allowing Martin to use a cart would not be a fundamental alteration. It reasoned that walking is not a fundamental character of golf, evidenced by the focus of the Rules of Golf, which do not mention walking. The Court also noted that many tournaments at various levels of play allow carts, including professional tournaments on the Champions PGA Tour (for golfers age 50 and over), and in Qualifying School for the PGA. The Court further reasoned that the fatigue from walking a golf course, (the PGA's given reason for its walking rule), is not significant. Rather, greater fatigue is incurred due to the psychological stress and motivation present in the game, which will be equally applicable to Martin. Finally, the Court emphasized that under Title III, an individualized inquiry is necessary, and that even if walking does cause fatigue, Martin endures greater fatigue due to his disability, with a cart, than do his walking competitors. Therefore, he would not have an unfair competitive advantage. As a result of this analysis, the Court concluded that providing Martin with a cart was therefore a reasonable modification that would not fundamentally alter the nature of PGA tournaments.

In dissent, Justice Scalia argued that Title III of the ADA applies only to customers, and then refuted the majority's conclusion that Martin was a “customer.” He noted that Martin does not buy the recreation or entertainment provided by the PGA, but rather sells it as an independent contractor. He further responded to the majority's point that golfers pay a fee for a chance to compete and are thereby “customers,” arguing instead that the purpose of qualifying tournaments is not entertainment for the golfers, but rather a tryout for hired positions.

Impact of the Supreme Court's ADA Decisions

Justice Scalia then refuted the majority's holding with regards to "fundamental alteration." He explained that while Title III requires providing the same goods and services to individuals with disabilities, it "does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features..." The PGA was not required to provide Martin with a cart, even if the modification does not alter an essential element of golf. Scalia further noted that with regards to whether walking is an essential element of golf, the Court should defer to whatever rules the PGA decides are "essential," as all rules in sports are arbitrary and for the ruling body of that sport to determine. Scalia next pointed out that an individualized approach that determines Martin will be equally as fatigued as other players is misguided, and creates a slippery slope for future cases. The ADA assures equal access to the PGA, not an equal chance to win, and the very nature of competitive sports involves an unequal distribution of ability. To artificially even out the chance to win, he argued, destroys the nature of the game.

Query: Does Justice Scalia's dissent provide support for the assertion that independent contractors are covered under Title III of the ADA?

Note: See the DBTAC: Great Lakes ADA Center Webinar on Employer Defenses.

Subsequent Interpretations by Lower Courts:

- ***Kuketz v. Petronelli*, 821 N.E.2d 473 (Mass. Jan 28, 2005)**

In *Kuketz*, an individual with paraplegia sued an Athletic Club under Title III of the ADA for its refusal to allow him to compete in a racquetball league with a modification to the rules that he be allowed two bounces instead of one as he uses a wheelchair. The Supreme Judicial Court of Massachusetts affirmed summary judgment for the club, holding that allowing two bounces for an individual in a wheelchair fundamentally altered the game of racquetball, and was therefore not a required accommodation. The court explained that unlike the use of golf carts in *Martin*, "the allowance for more than one bounce in racquetball is 'inconsistent with the fundamental character o

the game.'" Like the Court in *Martin*, the Massachusetts Court looked to the official rules of the sport at issue. It determined that hitting a moving ball with a racquet before the second bounce was the "essence of the game," and allowing two bounces would therefore alter an essential aspect of the game. The court rejected the argument that under *Martin*, the club had to evaluate the individual's particular circumstances and conduct an individualized inquiry. It explained that unlike *Martin*, which involved the alteration of a peripheral rule, this case involved an essential rule of competition, and that according to *Martin*, "the waiver of an essential rule of competition for anyone would fundamentally alter the nature of the event." (Emphasis added).

- ***Association For Disabled Americans v. Concorde Gaming Corp.*, 158 F.Supp.2d 1353 (S.D. Florida Aug. 20, 2001)**

In this case, plaintiffs alleged that a casino ship's craps tables were inaccessible to individuals in wheelchairs, and therefore violated Title III of the ADA. Specifically, plaintiffs argued that the tables' railings were too high, and requested that either individuals in wheelchairs be allowed to play in the areas designated for game attendants, where the railing is lowered, or that the tables' railings be lowered at other spots around the table. The court, citing *Martin*, rejected plaintiffs' argument, holding that either proposed modification would constitute a fundamental alteration, and was therefore not required of the casino. The court explained that the dimensions by which craps is played is a fundamental aspect of the game. Lowering the rail "would alter the playing surface in a manner that is the equivalent of changing the dimensions of a playing field or the size of the diameter of a golf hole." Also, the court determined that unlike in *Martin*, the proposed modifications may provide individuals with disabilities "an advantage not enjoyed by the other players." (The court did not elaborate on what sort of advantage the players would be receiving.)

- ***Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003)**

Helen Jones, an individual who had multiple sclerosis that limited her ability to walk, sued the City of Monroe, after it gave her several parking tickets. Monroe provided free 1-hour parking

Impact of the Supreme Court's ADA Decisions

spaces near Jones' place of work, but the City's all-day free parking spaces were all a few blocks away from Jones' office. Because of her disability, she parked all day in the 1-hour spots near her work. When she received parking tickets for doing so, she sued the City for disability discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act. The Sixth Circuit held that Jones' requested accommodation, allowing her to park in one of the 11 spots adjacent to her office, was a fundamental alteration not required of the City. Allowing Jones to park in a 1-hour spot would be at odds with the City's rule, because it would jeopardize the availability of parking spaces for other people. The dissent, relying on *Martin*, argued that allowing Jones to park all day in a 1-hour spot would not be a fundamental alteration to the nature of the service provided by the City. Just as *Martin* examined whether allowing a player to use a cart fundamentally altered golf tournaments as a whole, the court here should ask whether exempting Jones from the one-hour parking rule fundamentally alters the City's "downtown parking scheme as a whole." Conducting the type of individualized inquiry performed in *Martin*, allowing Jones to park in a one-hour spot does not fundamentally alter the City's entire parking scheme. The dissent pointed out that "whether the requested alteration jeopardizes the availability of spaces" for other individuals, as the majority asks, is not the right question. Permitting *Martin* to ride in a golf cart "jeopardizes" other golfers' chances of winning, but that does not mean it is a fundamental alteration. If Jones were accommodated, there would be 109, instead of 110 free spaces, and the dissent argues this cannot be a fundamental alteration of the City's services pursuant to *Martin*.

PGA v. Martin and independent contractors

Some courts have relied on *PGA v. Martin* to include ADA coverage of independent contractors. See, e.g., *Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113 (3rd Cir. 1998) ("A medical doctor with staff privileges... may assert a cause of action under Title III..."); *Haas v. WY Valley Health Care*, 553 F.Supp.2d 390 (MD PA 2008) (A physician with privileges had standing under Title III and the Rehab although he posed a direct threat and was not "qualified."). See also, *Fleming v.*

Yuma Regional Medical Center, 2009 WL 3856926 (9th Cir. November 19, 2009) (Finding that § 504 of the Rehabilitation Act covers independent contractors.) However, not all courts have followed this reasoning. See, *Wojewski v. Rapid City Regional Hospital*, 2005 WL 1397000 (D.S.D. 2005) (Rejected *Menkowitz* in finding that Title III should only apply to "customers" and not to a Dr. who was an independent contractor, citing Justice Scalia's dissent in *Martin*.)

Query: Is a dissent in a Supreme Court decision binding law?

Supreme Court Case: *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005)

Cruise passengers with disabilities brought action against a foreign-flagged cruise line, alleging violations of Title III of the ADA. Specifically, plaintiffs alleged that physical barriers on the ships denied them access to:

1. Emergency evacuation equipment and emergency evacuation-related programs;
2. Facilities such as public restrooms, restaurants, swimming pools, and elevators; and
3. Cabins with a balcony or a window.

Plaintiffs also alleged that the defendant charged them a premium for use of the four accessible cabins and the assistance of the ship's crew. The defendant argued that the ADA did not apply to foreign-flagged cruise ships.

The Supreme Court held that United States statutes may apply to foreign-flag ships, unless the statutes regulate matters involving only the internal order and discipline of the vessel. If a statute is to regulate such matters, then there must be a clear statement of congressional intent. Under this standard, the ADA applies to foreign-flagged cruise ships operating in U.S. waters to the extent it does not interfere with the internal operations of the ship. Without opining on the allegations' merit, the Court noted that certain discriminatory policies, such as charging persons with disabilities higher fares or requiring them to travel with companions would not interfere with "internal operations." As for

Impact of the Supreme Court's ADA Decisions

physical modifications, the Court noted that barrier removal is not “readily achievable” if it would bring a vessel into noncompliance with international safety standards or threaten shipboard safety. A plurality of the court went on to conclude that a permanent and substantial physical change qualifies as an interference of the ship’s internal affairs. Therefore, such modifications may not be imposed without a clear statutory statement.

Subsequent Interpretation by Lower Courts:

- ***White v. NCL America, Inc.*, 2006 WL 1042548 (S.D. Fla. March 8, 2006)**

A plaintiff with a mobility impairment filed an ADA lawsuit against NCL America after her experience on the cruise ship *Pride of Aloha*. She alleged nine barriers that could be removed in a readily achievable manner and without conflicting with the internal order of the cruise ship. Examples of barriers included an insufficient number of accessible cabins; higher prices for accessible rooms; door pressure; accessible seating in public areas; unavailability of lifts and inadequate paths of travel to the pool and spa; and more. In its motion for summary judgment, defendants argued that plaintiff failed to specify exactly which portions of the cruise ship are inaccessible. The court rejected this argument, stating that nothing in *Spector* requires any heightened pleading requirement and does not impose an obligation to establish the absence of international conflicts. In so ruling, the court also noted that it “is difficult to fathom what international obligations would conflict with a requirement that the *Pride of Aloha* be fitted with a pool lift.” The court denied defendants’ motion to dismiss.

Supreme Court Case: ***Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Resources*, 532 U.S. 598 (2001)**

Buckhannon Board and Care Home, Inc. provided assisted living to residents. It failed an inspection by the State Fire Marshal when some residents were determined “incapable of self-preservation,” or incapable of moving from imminent danger. Buckhannon sued, alleging that the

“self-preservation” requirement violated the ADA and Fair Housing Amendments Act (FHAA). After the state legislature enacted two bills eliminating this requirement, the case was found moot. Buckhannon then argued that as the “prevailing party,” it was entitled to attorney’s fees under the ADA and FHAA. Buckhannon relied on the “catalyst theory,” providing that “a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Although the applicability of the “catalyst theory” was widespread, the Supreme Court stated that it did not apply in the context of the ADA and FHAA. The Court held that a “prevailing party” exists only when there is a “court-ordered change in the legal relationship between the plaintiff and the defendant,” as in the case of a judgment or settlement agreement enforced by a consent decree. A defendant’s voluntary change in conduct or an “alteration of actual circumstances” lacks the necessary judicially-sanctioned change to justify an award of attorneys’ fees. The Court pointed to the plain meaning of “prevailing party” in support of its holding. The Court also dismissed Buckhannon’s arguments that the “catalyst theory” is necessary to prevent future defendants from mooting an action before judgment to avoid fees, and to avoid deterring plaintiffs with meritorious but expensive cases.

Query: Has the Court’s decision reduced the amount of litigation under Title III?

Subsequent Interpretation by Lower Courts:

- ***Perez v. Westchester County Dept. of Corrections*, 587 F.3d 143 (2nd Cir. 2009)**

In *Perez*, inmates sued the Department of Corrections for its refusal to provide Halal meat, as required by their Muslim religion. The district court judge directed the parties to appear at a settlement conference, actively urged settlement, made his views on the law applicable to the case clear, suggested appropriate settlement terms, reviewed and revised the settlement agreement with the parties, and ultimately entered an order approving the terms of a settlement. The inmates’ attorney then filed an application for attorney’s fees. Defendant opposed the application, arguing that

Impact of the Supreme Court's ADA Decisions

under *Buckhannon*, plaintiffs were not a “prevailing party,” because there was no material change in the parties legal relationship, and there was insufficient “judicial imprimatur” to satisfy *Buckhannon*. The Second Circuit disagreed and affirmed the district court’s award of attorney’s fees. Because the Department was “incapable of acting as it did before the entry of the Order,” the legal relationship of the parties had sufficiently changed. Furthermore, under *Buckhannon*, there was sufficient “judicial imprimatur,” even though this did not constitute a consent decree. The court focused on the district judge’s large involvement in creating the settlement, and his “judicial sanction” of the settlement through a court order. Because *Buckhannon* was satisfied, the inmates were a prevailing party, and attorney’s fees could be awarded.

Query: Does this decision go beyond *Buckhannon* since the Supreme Court only provided two examples of sufficient “judicial imprimatur” for purposes of determining that a party had “prevailed,” *i.e.*, a judgment or a consent decree?

Conclusion

Although the U.S. Supreme Court decisions in the *Sutton* trilogy⁹ and *Toyota v. Williams*¹⁰ are no longer applicable since the ADA Amendments Act of 2008 went into effect on January 1, 2009,¹¹ there are many Supreme Court ADA cases that are still good law. This legal brief reviewed and analyzed those decisions as well as lower court decisions applying Supreme Court precedent. Some ADA issues that still remain are:

- Whether reassignment means automatic placement into a position? (See *Barnett*)
- Whether a “clear and unmistakable” waiver of an ADA claim would be enforceable. (See *Wright*)
- Issues involving medical inquiries and confidentiality (no Supreme Court Cases)
- ADA Coverage of independent contractors (See *PGA v. Martin* and DBTAC: Great Lakes ADA

Center webinar on Employer Defenses)

- Is there a direct threat to safety defense under Title III?
- The effect of EEOC Regulations under the ADAAA (when released)
 - Proposed Regulations - Public comment period ended 11/23/09
 - JAN has guidance at: <http://www.jan.wvu.edu/bulletins/adaaa1.htm>

Notes

1. This legal brief was written by the following attorneys at Equip for Equality, the Illinois Protection and Advocacy Agency (P&A): Legal Advocacy Director Barry C. Taylor; Senior Attorney Alan M. Goldstein; and Staff Attorneys Rachel Margolis and Dan Spira. Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.
2. P.L. 110-325
3. *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); and *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999) were decided at the same time by the Supreme Court and are referred to collectively as the “*Sutton* trilogy.”
4. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
5. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (October 22, 2002), www.eeoc.gov/policy/docs/accommodation.html.
6. *Id.*
7. *See, e.g., Dilley v. Supervalu, Inc.*, 296 F.3d 958 (10th Cir. 2002); *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C.Cir. 1998); *Huber v. Wal-Mart Stores, Inc., EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir.2000); 486 F.3d 480 (8th Cir. 2007).

Impact of the Supreme Court's ADA Decisions

8. For a further discussion of *Cleveland* issues, please see: Alan Goldstein and Barbara Siegel, *Making the ADA Work for Social Security Disability Beneficiaries: Life After Cleveland v. Policy Management Systems*, Clearinghouse Review: Journal of Poverty Law and Policy, September-October 2007, Volume 41, Numbers 5-6, Pages 317-326, Published by Sargent Shriver National Center on Poverty Law; and Lauren Lowe, *What Employees Say, or What Employers Do: How Post-Cleveland Decisions Continue to Obscure Discrimination*, 62 Vanderbilt Law Review 1245 (2009).
9. *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999) were decided at the same time by the Supreme Court and are referred to collectively as the "*Sutton* trilogy."
10. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
11. P.L. 110-325