Chapter 4

Public Accommodations

A. Introduction and Overview

"Public accommodations" in the context of disability discrimination law refers to privately operated facilities that are used by the public. The most comprehensive coverage of these facilities is found under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq. Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §12181, lists twelve specific categories. These are

> Lodging (other than apartments), eating establishments, entertainment facilities, public gathering places, stores and sales establishments, service establishments (including law offices and health care provider facilities), transportation stations, public display facilities (such as museums), places of recreation (such as parks), places of education, social service centers, and exercise facilities (such as golf courses).

The ADA is the primary disability discrimination law affecting such privately operated programs. Most of these programs do not receive federal financial assistance and, therefore, are not subject to Section 504 of the Rehabilitation Act, 29 U.S.C. §794. The major exceptions are probably some private health care programs receiving federal research grants, education programs such as private colleges receiving federal financial assistance through government loan programs or federal grants, and private schools receiving funding for school lunches and similar federal funding, and some social service centers that receive federal support.

In addition to the twelve categories specified within Title III of the ADA, there are a number of other types of privately provided services or accommodations that are the subject of nondiscrimination mandates. The two major categories of private providers of public accommodations that are not included within the scope of the ADA are airline transportation and housing. Both of these types of public accommodations were exempted for the most part from the ADA because of earlier Congressional enactments. For airline travel, Congress amended the Federal Aviation Act by passing the Air Carrier Access Act in 1986. In *Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9th Cir. 2013), the court held that an airline terminal was not a public accommodation under the ADA because air terminals are covered by the Air Carrier Access Act. This issue is discussed later in this chapter. Housing, which is subject to the 1988 amendments to the Fair Housing Act, is covered in Chapter 8.

Mass transit and driver's licensing are primarily governmental operated or controlled programs. For that reason, these issues are treated in Chapter 5, on Governmental Services and Programs. Transportation provided by private taxi services and interstate bus services provided by private entities are also addressed in Chapter 5 because of the pervasive governmental regulation of these services, and to avoid duplication of coverage in both chapters.

Chapter 6 (Higher Education) and Chapter 7 (Education) address the concepts of privately operated public accommodations (i.e., private schools) and state and local governmentally operated public services (i.e., public schools). Chapter 4 will not address those programs.

Health care providers, which are both private and public programs, present unique issues. For that reason, Chapter 9 treats health care separately.

The three major issues applicable to public accommodations are nondiscrimination, reasonable accommodation (requiring modification of policies, practices, and procedures and providing auxiliary

services), and barrier-free design. While the ADA is the major and most comprehensive federal statutory coverage for privately operated public accommodations, many states and local governments also have mandates in one or more of these areas. The ADA contemplates that services and programs will be provided in the least restrictive setting possible. The principle of mainstreaming is consistent throughout all federal statutes related to disability discrimination.

There are some programs that may be affected by more than one part of the ADA or by other federal laws. For example, a private book store or restaurant leasing space in an airport terminal may be subject to Section 504 of the Rehabilitation Act because of federal funding in subsidizing the terminal, Title II of the ADA because the terminal is operated by a local municipal governmental authority, and Title III of the ADA because it is one of the categories of public accommodations. If the private store had 15 or more employees, it would also be subject to Title I of the ADA.

The cases in this section focus primarily on whether the entity is subject to Title III of the ADA. The cases have been selected to highlight unusual situations or emerging issues as well as two Supreme Court decisions on specific types of programs—professional golf tournaments and cruise ships. The decisions along with the statutory and regulatory language provide guidance for other settings.

[1] Chapter Goals

This chapter will provide the following:

- A review of the key principles of the applicable statutes
- An application of these principles in the context of:
    - Privately provided public accommodations
    - Ensuring that principles of least restrictive environment are applied
- An understanding of the major statutory provisions that affect public accommodations and their relationship to those that affect state and local governmental programs
- An understanding of where Title II and Title III of the ADA differ regarding substantive application and enforcement
- An understanding of the concepts of discrimination and reasonable accommodation including modification of policies, practices and procedures and provision of auxiliary services
- An understanding of architectural barrier issues and requirements that relate to existing facilities, new facilities, and renovations and alterations
- An understanding of the major exemptions from ADA coverage
- Application of federal statutes to air transportation settings and to telecommunications
- An understanding of issues related to service and emotional support animals in various settings
- A general awareness of enforcement requirements
- A general overview of some of the emerging issues and trends affecting public accommodations
- Opportunities to apply all of these concepts to hypothetical fact patterns

[2] Key Concepts and Definitions

The following are some key concepts for reference in learning about individuals with disabilities in the context of public accommodations.

Alterations

Generally refers to a physical change that affects the usability of a facility. Where such changes are made after the effective date of a particular statute (ADA, Rehabilitation Act), the facility must meet specific design standards with respect to those areas that are altered. Repainting and similar kinds of cosmetic changes do not generally trigger requirements under the ADA or Rehabilitation Act.

Americans with Disabilities Act

Enacted in 1990, the ADA provides specific requirements for twelve specific categories of accommodations provided to the public by private entities (Title III). It includes provisions related to design features primarily affecting individuals with mobility and sensory impairments and nondiscrimination requirements that contemplate reasonable accommodations.

Architectural barriers

This primarily refers to design features that indirectly affect the ability of individuals with mobility and sensory impairments to access the physical facilities of facilities and structures.

Covered facilities and programs

There are twelve categories of programs subject to Title III of the ADA. These are to be liberally construed. They include the following:

- Lodging (other than apartments)
- Eating establishments
- Entertainment facilities
- Public gathering places
- Stores and sales establishments
- Service establishments
- Transportation stations
- Public display facilities
- Places of recreation
- Places of education
- Social service centers
- Exercise facilities

While many programs fit within these categories are provided by state or local government entities, only those that are privately operated are subject to Title III of the ADA. Only those receiving federal financial assistance are subject to Section 504 of the Rehabilitation Act.

Design standards

Detailed sets of regulations provide specifications for a range of issues affecting physical design for both mobility and sensory impairments. These are standards that relate to new construction or that should be followed when there are certain types of alterations or renovations. The standards cover aspects such as slopes, elevators, parking, seating in assembly areas, restrooms, and paths of travel. They also cover signage. Each program is unique and it is impossible to provide with specificity every detail of what would make a program as a whole accessible.

Exemptions and limitations

As a policy matter, Title III of the ADA contemplates a number of specific exemptions to coverage. Some of these are referenced in the statutory language, and other exemptions are found in the regulations. Several of the cases in this chapter highlight issues that have been addressed by courts looking at these exemptions and limitations. Other limitations have been set by courts. These are:

- Religious exemptions
- Private clubs
- Mixed use residential facilities
- Leased spaces
- Parent/subsidiary situations

- Private homes
- Smoking

Existing facilities

Federal statutes have differing requirements regarding retrofitting physical facilities that were built before the applicable date of the relevant statute. Generally, under Title III of the ADA, public accommodations must remove barriers to the extent it is readily achievable to do so. For private providers of public accommodations receiving federal financial assistance, barriers in existing facilities were to have been removed to the extent that the program is accessible when viewed in its entirety.

Four walls

This is a concept on which jurisdictions disagree. Some require that Title III of the ADA only applies to physical structures (the four walls concept), while other courts find that programs such as offering insurance or websites also fall within the programs covered by Title III.

New construction

Depending on the applicable date of the relevant statute (ADA or Section 504), a specific set of detailed design standards apply to new construction by entities providing accommodations to the public.

Public accommodations

Within Title III of the ADA, this refers to *private* entities that provide accommodations open to the public. Title II (for state and local governmentally provided programs) and Section 504 of the Rehabilitation Act (for all entities receiving federal financial assistance), often, but not always, provide for similar requirements for physical facilities and nondiscrimination as Title III. The enforcement and remedies under Title III, however, differ.

Public services

The term “public services” generally refers to programs provided by a governmental entity. Within the ADA, this only refers to state and local governmental entities. Services funded or provided by the federal government are covered under the Rehabilitation Act and other statutes. There are a number of private services and programs that are public accommodations under Title III of the ADA that are heavily regulated or funded by governmental authorities. These include transportation and utility systems as well as many educational programs and health care programs. Licensing of many private operations is provided by governmental programs. The interplay of these statutes for programs affected by several statutes has been the topic of judicial attention.

Reasonable accommodations

Unlike most civil rights statutes, the ADA and the Rehabilitation Act require more than nondiscrimination. They also require reasonable accommodation. Some of the requirements are spelled out in regulatory and statutory language (although generally not as all-inclusive listings). Reasonable accommodations include both auxiliary aids and services (such as interpreters) and modification of policies, practices, and procedures (such as allowing assistance animals in places where they are ordinarily prohibited).

This requirement is not intended to require unduly burdensome (administratively or financially) accommodations. Nor is it intended to require that fundamental alterations to a program be made. Case law highlights that the burden is generally on the program to demonstrate that a requested accommodation is not reasonable. It also demonstrates that federal statutes contemplate individualized determinations and an interactive process in determining what accommodations would be reasonable.

Individuals seeking accommodations are not entitled to their preferred or a best accommodation. The accommodation should be reasonable and effective. What is unclear at present is whether the accommodation must be "necessary" for it to be required.

Section 504 of the Rehabilitation Act

Many ADA Title III private programs that provide accommodations to the public receive federal financial assistance. Many programs subject primarily to Section 504 of the Rehabilitation Act and Title II (such as public universities) may also have within them Title III entities, such as bookstores, or they may lease or use or facilitate private programs. The determination of which requirements apply and how they relate can be complex and challenging.

Hypothetical Problem 4.1

Shane is a 35 year old who is the Deputy Director of Finance for Springfield College, located in the Midwest. In 2014, he was called from National Guard Reserves to active duty in the military. He served in Iraq and Afghanistan until early 2015, when the vehicle in which he was riding hit a land mine and he sustained serious injuries resulting in some paralysis to his lower extremities. In Spring 2016, after extensive rehabilitation, he returned to his previous employment (from which he had been granted a leave of absence). Although he does not have total paralysis in his legs, he uses a wheelchair for mobility. He was always athletic and had played basketball and golf before his injury. He has begun to play wheelchair basketball on campus and has even gone to the driving range to hit some balls. He can stand for long enough to hit the ball, although his accuracy and distance are not good. He still enjoys playing.

He has learned about a three day conference for university finance directors in Clayton, a city some distance from Springfield. The conference brochure notes that the hotel (which is part of a chain hotel) is located in an historic renovated railroad station, which now includes conference meeting rooms and ballrooms. Connected to the hotel is an arcade with shops, restaurants, a casino, and a movie theater. Extra events that conference attendees can sign up for are a trolley tour of the historic area of Clayton and a conference attendee golf tournament.

Shane was eager to get back to his previous life and to network again with colleagues he had known before. It is essential to him that he have an accessible hotel room, particularly for access in the bathroom. He could not tell from the hotel website how many hotel rooms are accessible and when he tried to register on-line through the web, there was no way to know if his request for an accessible room would be honored. The website does provide some general information about access, but there is no specific contact information link for more details. Shane tried to call the hotel directly, but the person to whom he spoke assured him that there were plenty of accessible rooms and that he should not worry. Shane's conference registration also included his selection of the golf outing and the trolley tour and a concert at a nearby stadium.

When Shane arrived at the conference, he had difficulty registering at the hotel because the reception desk clerk could not see him over the counter. He learned that all the accessible rooms had been taken. The clerk was apologetic and said this was unusual. The clerk called a nearby hotel (two blocks away) and found an accessible room for Shane, although the room rate was a bit higher. Shane also encountered the following challenges during his conference attendance.

- Meeting Rooms—One of the breakout meeting rooms was located in a room that had three steps. Other attendees offered to carry him in and out of the room. He declined and attended a different session.
- Cocktail Lounges—There were three different cocktail lounge/bar facilities in the hotel and two of them were divided so there were steps to reach some of the areas. In one of the lounges, in order to be allowed to sit at a table (rather than at the bar), the customer had to order food, not

just a drink. Smoking was allowed in all of the lounges, which caused a serious reaction because of lung damage he had suffered during the explosion when he was injured.
- Casino—In the casino, he could not play Blackjack because the table was too high.
- Golf tournament—His request to drive the golf cart onto the putting green was denied, so he quit after the first hole.
- Trolley ride—The trolley cars had no hydraulic lifts, and he was told that they were historic and could not be made accessible without destroying the appearance.
- Movie attendance—When he tried to attend the movie that had only stadium seating, he was only able to sit in the front of the first row, requiring him to view the screen at a very painful angle. The same was true for the concert.

During the conference he met another veteran, Jeffrey, who told him that he had post traumatic stress disorder, and his psychologist had recommended that he bring a companion dog to relieve stress in public places. His dog, Trusty, was a large German Shepherd. Jeffrey told Shane that the hotel and the adjacent arcade would not allow Trusty in the public areas because Jeffrey did not have any "official" documentation about Trusty's training and it was not apparent that Jeffrey required assistance of any kind.

The conference was not the positive experience Shane had hoped it would be. Although he had not had a problem flying to Clayton, on the flight back, the airline would not allow him to exit first in order to make a tight connection at the airport where he had to change planes. He missed the flight and had to wait four hours for the next flight. Upon his return, Shane has become so angry that he has contacted a local attorney and given her this information. He wants advice about whether to bring a legal action, what his rights might be, who might be liable, what strategies to take, and whether it might be a good idea to contact Jeffrey about a possible class action to address some of the concerns.

The ADA is not entirely clear in its language about the extent to which providers of insurance of various types are considered to be public accommodations subject to Title III of the ADA. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §5.02 (2012 and cumulative supplements). The following case is one of the major cases holding that long term disability insurance is not covered by the ADA. The case illustrates one interpretation of what is to be defined as a public accommodation.

Parker v. Metropolitan Life Insurance Co.

121 F.3d 1006 (6th Cir. 1997)

[The employee claimed that the long term disability plan which contained longer benefits for physical disabilities than mental disabilities violates Title I and Title III of the ADA. The portion of the case addressing the Title I and the ERISA claims is omitted. The decision affirms the lower court decision. The *Parker* decision highlights one judicial viewpoint about what is sometimes referred to as the "four walls" requirement of Title III, that the entity be a physical place. As noted in the dissent, other courts have taken a different view. The case does not address the substantive issue of potential discrimination in health insurance. This is addressed in Chapter 9.]

KENNEDY, CIRCUIT JUDGE. [Joined by seven other judges.]

I.

Plaintiff, Ouida Sue Parker, was employed by Schering-Plough Health Care Products, Inc. ("Schering-Plough") from April 20, 1981 through October 29, 1990. During her employment, Parker participated in a long-term disability plan offered by Schering-Plough to its employees; the plan was issued by Metropolitan Life Insurance Co. ("MetLife"). Under the plan, an individual who is deemed

to be totally disabled due to a mental or nervous disorder may receive benefits for up to twenty-four months, unless at the termination of the twenty-four month period, the individual was hospitalized or receiving inpatient care for the disorder. For physical disorders, however, the plan provides for benefits until the individual reaches sixty-five years of age.

The District Court ... dismissed Parker's claim against the defendants under Title III of the ADA, 42 U.S.C. §§12165–12189. Met Life was not a proper defendant under Title III, the court concluded, because Title III only covers discrimination in the physical access to goods and services, not discrimination in the terms of insurance policies.

III.

A. *Title III: Places of Public Accommodation*

To determine whether a benefit plan provided by an employer falls within the prohibitions of Title III, we must begin by examining the statutory text. Title III of the ADA specifically addresses discrimination by owners, lessors, and operators of public accommodations. It provides as follows:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. §12182(a).

Section 12181 sets forth [a] list of private entities that are considered public accommodations for purposes of Title III.

> ....
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.

Title III specifically prohibits, inter alia, the provision of unequal or separate benefits by a place of public accommodation. See 42 U.S.C. §§12182(b)(1)(A)(i)–(iii). For example, 42 U.S.C. §12182(b)(1)(A)(ii) provides that it is "discriminatory to afford an individual or class of individuals, on the basis of a disability ... with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals ..." 42 U.S.C. §12182(b)(1)(a)(ii). To the extent that subsections (i), (ii), and (iii) do not explicitly state that they apply only to public accommodations, subsection (iv) expressly provides that "... the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation ..." 42 U.S.C. §12182(b)(1)(a)(iv).

While we agree that an insurance office is a public accommodation as expressly set forth in §12181(7), plaintiff did not seek the goods and services of an insurance office. Rather, Parker accessed a benefit plan provided by her private employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation. As is evident by §12187(7), a public accommodation is a physical place and this Court has previously so held.... This Court [in other cases has] rejected the plaintiffs' contention holding that the defendants did not fall within any of the twelve categories enumerated in §12181(7). Furthermore, we held that "the prohibitions of Title III are restricted to 'places' of public accommodation ..." A "place," as defined by the applicable regulations, is "'a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the' twelve 'public accommodation' categories." "'Facility,' in turn, is defined as 'all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.'" [In the case of *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir.), *cert. denied*, 516 U.S. 1028 (1995),] the court acknowledged that the football games were played in a place of

accommodation and that the television broadcasts were a service provided by the defendants, the court concluded that the broadcasts "do not involve a 'place of public accommodation.'" Accordingly, we held that the service offered by the defendants did not involve a place of public accommodation. Quoting the district court's opinion, we explained that "'[i]t is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers which fall within the scope of Title III.'" Finally, the court noted that "plaintiffs' argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute."

Similarly, the good that plaintiff seeks is not offered by a place of public accommodation. The public cannot enter the office of MetLife or Schering-Plough and obtain the long-term disability policy that plaintiff obtained. Parker did not access her policy from MetLife's insurance office. Rather, she obtained her benefits through her employer. There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office.

The Department of Justice's explanation of whether wholesale establishments are places of public accommodation supports our conclusion that MetLife's offering of a disability plan to Schering-Plough is not a service offered by a place of public accommodation. As the Department explains:

> ... The Department intends for wholesale establishments to be covered ... as places of public accommodation except in cases where they sell exclusively to other businesses and not to individuals ... [However], [i]f th[e wholesale company] operates a road side stand where its crops are sold to the public, the road side stand would be a sales establishment covered by the ADA ...
>
> Of course, a company that operates a place of public accommodation is subject to this part only in the operation of that place of public accommodation. In the example given above, the wholesale produce company that operates a road side stand would be a public accommodation only for the purposes of the operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access ...

28 C.F.R. pt. 36, app. B at 604 (1996). Thus, the offering of disability policies on a discounted rate solely to a business is not a service or good offered by a place of public accommodation.

Furthermore, Title III does not govern the content of a long-term disability policy offered by an employer. The applicable regulations clearly set forth that Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation. According to the Department of Justice:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.

While Title IV of the ADA, 42 U.S.C. §12201(c), may address the contents of insurance policies provided by a public accommodation, Title IV does not address the contents of a long-term disability plan offered by an employer because it is not a place of public accommodation. We, therefore, disagree with the First Circuit's decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England Inc.*, 37 F.3d 12 (1st Cir. 1994). In *Carparts*, the health benefit plan offered by the employer contained a $25,000 cap on benefits for AIDS related illnesses while the plan provided $1,000,000 in coverage for any other illness. The executors of the estate of an employee, who suffered from AIDS, brought suit against the provider of the self-funded medical reimbursement plan under the ADA alleging that the lifetime cap on health benefits for individuals with AIDS was discriminatory. The court rejected the district court's conclusion that defendants were

not liable under Title III because they were not places of public accommodation. In rejecting the district court's construction, the court cited to the list of private entities considered public accommodations in §12181(7) of Title III. The court particularly noted that the list includes a "'travel service,' a 'shoe repair service,' an 'office of an accountant, or lawyer,' an 'insurance office,' a 'professional office of a healthcare provider,' and 'other service establishment[s].'" The plain meaning of those terms, the court concluded, "does not require 'public accommodations' to have physical structures for persons to enter." The court further noted that "[b]y including 'travel service' among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure." The court, therefore, concluded that a defendant who provides medical benefit plans could be considered a public accommodation under Title III.

In arriving at this conclusion, the First Circuit disregarded the statutory canon of construction, noscitur a sociis. The doctrine of noscitur a sociis instructs that "a ... term is interpreted within the context of the accompanying words 'to avoid the giving of unintended breadth to the Acts of Congress.'"

The clear connotation of the words in §12181(7) is that a public accommodation is a physical place. Every term listed in §12181(7) and subsection (F) is a physical place open to public access. The terms travel service, shoe repair service, office of an accountant or lawyer, insurance office, and professional office of a healthcare provider do not suggest otherwise. Rather than suggesting that Title III includes within its purview entities other than physical places, it is likely that Congress simply had no better term than "service" to describe an office where travel agents provide travel services and a place where shoes are repaired. Office of an accountant or lawyer, insurance office, and professional office of a healthcare provider, in the context of the other terms listed, suggest a physical place where services may be obtained and nothing more. To interpret these terms as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute and the principle of noscitur a sociis.

Accordingly, we conclude that the provision of a long-term disability plan by an employer and administered by an insurance company does not fall within the purview of Title III.

[Title I portion omitted.]

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

BOYCE F. MARTIN, JR., CHIEF JUDGE, dissenting.

I join Judge Merritt and others in dissenting from the opinion of the Court in this case. I write separately to highlight my agreement with Judge Merritt regarding congressional intent and to emphasize my disagreement with the majority's interpretation of *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995).

In *Stoutenborough*, a hearing impaired individual and an association of hearing impaired individuals sought to prohibit the National Football League, its member clubs, and several broadcast companies from using the so-called "blackout rule" to avoid broadcasting live local football games when tickets to the live game had not been completely sold seventy-two hours before the game. With regard to Stoutenborough's Title III claim, we stated that "plaintiff's argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute."

The majority takes this language to mean that Title III's mandates are limited to physical structures. However, *Stoutenborough* recognized that, in the context of a Title III claim, the term "place" is a defined term; we recognized that "a 'place' is '[1] a facility, [2] operated by a private entity, [3] whose operations affect commerce and [4] fall within at least one of the twelve "public accommodation" categories.'" Because the defendants in *Stoutenborough*, did not fall within one of the twelve public

accommodation categories, they were not "places" of public accommodation as required for Title III protection. Thus, although *Stoutenborough* limited Title III's applicability to "places," it did so in the context of the defined meaning of the term "place." Unlike the defendants in *Stoutenborough*, Title III specifically identifies an "insurance office" as a public accommodation.

Not only does the majority view incorrectly apply *Stoutenborough*, it also directly conflicts with the conclusion reached by the First Circuit. In *Carparts Distribution Ctr. v. Automotive Wholesalers Ass'n of New England*, 37 F.3d 12 (1st Cir. 1994), the First Circuit held that, by including travel services in the list of public accommodations, Congress chose not to limit Title III protections to physical structures. The *Carparts* court wrote: "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." Similarly, Judge Merritt notes that, under the majority view, individuals who purchase insurance through an insurance office are entitled to Title III protections while those who purchase insurance through their employers receive no Title III protections.

In my view, Judge Merritt and the First Circuit present a more compelling argument. As the First Circuit noted, "[t]he purpose of Title III is 'to bring individuals with disabilities into the economic and social mainstream of American life ... in a clear, balanced, and reasonable manner.'"

By limiting Title III's applicability to physical structures, the majority interprets Title III in a manner completely at odds with clear congressional intent. In recent years, the economic and social mainstream of American life has experienced significant change due to technological advances. An increasing array of products and services are becoming available for purchase by telephone order, through the mail, via the Internet, and other communications media. Unfortunately, under the majority view, the same technological advances that have offered disabled individuals unprecedented freedom may now operate to deprive them of rights that Title III would otherwise guarantee. As the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted.

In my view, the majority view incorrectly applies a prior opinion of this Court and reaches a conclusion clearly at odds with congressional intent. Accordingly, I join Judge Merritt and respectfully dissent.

[The dissent by Judge Merritt addresses the merits of whether the policy itself was discriminatory and whether the "safe harbor" provision applies and whether actuarial principles would allow the practice.]

Note

Although this court determines that this insurance program is not covered by Title III of the ADA, most other courts have disagreed. The cases instead focus on issues of differential treatment for mental and physical conditions and caps on certain conditions, such as cancer and HIV. The courts have upheld the mandate that disability based distinctions must be based on legitimate actuarial data or reasonable experience. For cases on this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §10.2 (2012 and cumulative supplement).

In the following case, the court addressed whether the Professional Golf Association is an entity covered by Title III of the ADA. In addition to addressing that issue, the court also addresses some of the substantive issues of Title III of the ADA, including the meaning of the terms "essential functions" and "fundamental alterations." It also notes that documentation of the condition had been provided. The issue of documentation has become more contentious since this decision.

PGA Tour, Inc. v. Casey Martin

JUSTICE STEVENS delivered the opinion of the Court:

Petitioner PGA TOUR, Inc., a nonprofit entity formed in 1968, sponsors and cosponsors professional golf tournaments conducted on three annual tours. About 200 golfers participate in the PGA TOUR; about 170 in the NIKE TOUR; and about 100 in the SENIOR PGA TOUR. PGA TOUR and NIKE TOUR tournaments typically are 4-day events, played on courses leased and operated by petitioner. The entire field usually competes in two 18-hole rounds played on Thursday and Friday; those who survive the "cut" play on Saturday and Sunday and receive prize money in amounts determined by their aggregate scores for all four rounds. The revenues generated by television, admissions, concessions, and contributions from cosponsors amount to about $300 million a year, much of which is distributed in prize money.

There are various ways of gaining entry into particular tours. For example, a player who wins three NIKE TOUR events in the same year, or is among the top-15 money winners on that tour, earns the right to play in the PGA TOUR. Additionally, a golfer may obtain a spot in an official tournament through successfully competing in "open" qualifying rounds, which are conducted the week before each tournament. Most participants, however, earn playing privileges in the PGA TOUR or NIKE TOUR by way of a three-stage qualifying tournament known as the "Q-School."

Any member of the public may enter the Q-School by paying a $3,000 entry fee and submitting two letters of reference from, among others, PGA TOUR or NIKE TOUR members. The $3,000 entry fee covers the players' greens fees and the cost of golf carts, which are permitted during the first two stages, but which have been prohibited during the third stage since 1997. Each year, over a thousand contestants compete in the first stage, which consists of four 18-hole rounds at different locations. Approximately half of them make it to the second stage, which also includes 72 holes. Around 168 players survive the second stage and advance to the final one, where they compete over 108 holes. Of those finalists, about a fourth qualify for membership in the PGA TOUR, and the rest gain membership in the NIKE TOUR. The significance of making it into either tour is illuminated by the fact that there are about 25 million golfers in the country.

Three sets of rules govern competition in tour events. First, the "Rules of Golf," jointly written by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland, apply to the game as it is played, not only by millions of amateurs on public courses and in private country clubs throughout the United States and worldwide, but also by the professionals in the tournaments conducted by petitioner, the USGA, the Ladies' Professional Golf Association, and the Senior Women's Golf Association. Those rules do not prohibit the use of golf carts at any time.

Second, the "Conditions of Competition and Local Rules," often described as the "hard card," apply specifically to petitioner's professional tours. The hard cards for the PGA TOUR and NIKE TOUR require players to walk the golf course during tournaments, but not during open qualifying rounds. On the SENIOR PGA TOUR, which is limited to golfers age 50 and older, the contestants may use golf carts. Most seniors, however, prefer to walk.

Third, "Notices to Competitors" are issued for particular tournaments and cover conditions for that specific event. Such a notice may, for example, explain how the Rules of Golf should be applied to a particular water hazard or man-made obstruction. It might also authorize the use of carts to speed up play when there is an unusual distance between one green and the next tee.

The basic Rules of Golf, the hard cards, and the weekly notices apply equally to all players in tour competitions. As one of petitioner's witnesses explained with reference to "the Masters Tournament, which is golf at its very highest level ... the key is to have everyone tee off on the first hole under exactly the same conditions and all of them be tested over that 72-hole event under the conditions that exist during those four days of the event."

Casey Martin is a talented golfer. Martin is also an individual with a disability as defined in the Americans with Disabilities Act of 1990 (ADA or Act). Since birth he has been afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. The disease is progressive; it causes severe pain and has atrophied his right leg. During the latter part of his college career, because of the progress of the disease, Martin could no longer walk an 18-hole golf course. Walking not only caused him pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required. For these reasons, Stanford made written requests to the Pacific 10 Conference and the NCAA to waive for Martin their rules requiring players to walk and carry their own clubs. The requests were granted.

When Martin turned pro and entered petitioner's Q-School, the hard card permitted him to use a cart during his successful progress through the first two stages. He made a request, supported by detailed medical records, for permission to use a golf cart during the third stage. Petitioner refused to review those records or to waive its walking rule for the third stage. Martin therefore filed this action.

Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals. At issue now, as a threshold matter, is the applicability of Title III to petitioner's golf tours and qualifying rounds, in particular to petitioner's treatment of a qualified disabled golfer wishing to compete in those events.

The phrase "public accommodation" is defined in terms of 12 extensive categories, which the legislative history indicates "should be construed liberally" to afford people with disabilities "equal access" to the wide variety of establishments available to the nondisabled.

It seems apparent, from both the general rule and the comprehensive definition of "public accommodation," that petitioner's golf tours and their qualifying rounds fit comfortably within the coverage of Title III, and Martin within its protection. The events occur on "golf courses," a type of place specifically identified by the Act as a public accommodation. §12181(7)(L). In addition, at all relevant times, petitioner "leases" and "operates" golf courses to conduct its Q-School and tours. §12182(a). As a lessor and operator of golf courses, then, petitioner must not discriminate against any "individual" in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of those courses. Certainly, among the "privileges" offered by petitioner on the courses are those of competing in the Q-School and playing in the tours; indeed, the former is a privilege for which thousands of individuals from the general public pay, and the latter is one for which they vie. Martin, of course, is one of those individuals. It would therefore appear that Title III of the ADA, by its plain terms, prohibits petitioner from denying Martin equal access to its tours on the basis of his disability.

Petitioner argues otherwise. To be clear about its position, it does not assert (as it did in the District Court) that it is a private club altogether exempt from Title III's coverage. In fact, petitioner admits that its tournaments are conducted at places of public accommodation. Nor does petitioner contend (as it did in both the District Court and the Court of Appeals) that the competitors' area "behind the ropes" is not a public accommodation, notwithstanding the status of the rest of the golf course. Rather, petitioner reframes the coverage issue by arguing that the competing golfers are not members of the class protected by Title III of the ADA.

According to petitioner, Title III is concerned with discrimination against "clients and customers" seeking to obtain "goods and services" at places of public accommodation, whereas it is Title I that protects persons who work at such places. As the argument goes, petitioner operates not a "golf course" during its tournaments but a "place of exhibition or entertainment," and a professional golfer such as Martin, like an actor in a theater production, is a provider rather than a consumer of the entertainment that petitioner sells to the public. Martin therefore cannot bring a claim under Title III because he is not one of the "clients or customers of the covered public accommodation." Rather,

Martin's claim of discrimination is "job-related" and could only be brought under Title I—but that Title does not apply because he is an independent contractor (as the District Court found) rather than an employee.

The reference to "clients or customers" that petitioner quotes appears in 42 U.S.C. §12182(b)(1)(A)(iv), which states: "For purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." Clauses (i) through (iii) of the subparagraph prohibit public accommodations from discriminating against a disabled "individual or class of individuals" in certain ways either directly or indirectly through contractual arrangements with other entities. Those clauses make clear on the one hand that their prohibitions cannot be avoided by means of contract, while clause (iv) makes clear on the other hand that contractual relationships will not expand a public accommodation's obligations under the subparagraph beyond its own clients or customers.

As petitioner recognizes, clause (iv) is not literally applicable to Title III's general rule prohibiting discrimination against disabled individuals. Title III's broad general rule contains no express "clients or customers" limitation, §12182(a), and §12182(b)(1)(A)(iv) provides that its limitation is only "for purposes of" the clauses in that separate subparagraph. Nevertheless, petitioner contends that clause (iv)'s restriction of the subparagraph's coverage to the clients or customers of public accommodations fairly describes the scope of Title III's protection as a whole.

We need not decide whether petitioner's construction of the statute is correct, because petitioner's argument falters even on its own terms. If Title III's protected class were limited to "clients or customers," it would be entirely appropriate to classify the golfers who pay petitioner $3,000 for the chance to compete in the Q-School and, if successful, in the subsequent tour events, as petitioner's clients or customers. In our view, petitioner's tournaments (whether situated at a "golf course" or at a "place of exhibition or entertainment") simultaneously offer at least two "privileges" to the public—that of watching the golf competition and that of competing in it. Although the latter is more difficult and more expensive to obtain than the former, it is nonetheless a privilege that petitioner makes available to members of the general public. In consideration of the entry fee, any golfer with the requisite letters of recommendation acquires the opportunity to qualify for and compete in petitioner's tours. Additionally, any golfer who succeeds in the open qualifying rounds for a tournament may play in the event. That petitioner identifies one set of clients or customers that it serves (spectators at tournaments) does not preclude it from having another set (players in tournaments) against whom it may not discriminate. It would be inconsistent with the literal text of the statute as well as its expansive purpose to read Title III's coverage, even given petitioner's suggested limitation, any less broadly.

Our conclusion is consistent with case law in the analogous context of Title II of the Civil Rights Act of 1964. Title II of that Act prohibits public accommodations from discriminating on the basis of race, color, religion, or national origin. In *Evans v. Laurel Links, Inc*., 261 F. Supp. 474, 477 (E.D. Va. 1966), a class action brought to require a commercial golf establishment to permit black golfers to play on its course, the District Court held that Title II "is not limited to spectators if the place of exhibition or entertainment provides facilities for the public to participate in the entertainment."

As we have noted, 42 U.S.C. §12182(a) sets forth Title III's general rule prohibiting public accommodations from discriminating against individuals because of their disabilities. The question whether petitioner has violated that rule depends on a proper construction of the term "discrimination," which is defined by Title III to include:

> "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making

such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."

Petitioner does not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments. Martin's claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary. In this case, however, the narrow dispute is whether allowing Martin to use a golf cart, despite the walking requirement that applies to the PGA TOUR, the NIKE TOUR, and the third stage of the Q-School, is a modification that would "fundamentally alter the nature" of those events.

In theory, a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition. We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense.

As an initial matter, we observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shot-making—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible. That essential aspect of the game is still reflected in the very first of the Rules of Golf, which declares: "The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules." Over the years, there have been many changes in the players' equipment, in golf course design, in the Rules of Golf, and in the method of transporting clubs from hole to hole. Originally, so few clubs were used that each player could carry them without a bag. Then came golf bags, caddies, carts that were pulled by hand, and eventually motorized carts that carried players as well as clubs. "Golf carts started appearing with increasing regularity on American golf courses in the 1950's. Today they are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers." There is nothing in the Rules of Golf that either forbids the use of carts, or penalizes a player for using a cart. That set of rules, as we have observed, is widely accepted in both the amateur and professional golf world as the rules of the game. The walking rule that is contained in petitioner's hard cards, based on an optional condition buried in an appendix to the Rules of Golf, is not an essential attribute of the game itself.

Indeed, the walking rule is not an indispensable feature of tournament golf either. As already mentioned, petitioner permits golf carts to be used in the SENIOR PGA TOUR, the open qualifying events for petitioner's tournaments, the first two stages of the Q-School, and, until 1997, the third stage of the Q-School as well. Moreover, petitioner allows the use of carts during certain tournament rounds in both the PGA TOUR and the NIKE TOUR. In addition, although the USGA enforces a walking rule in most of the tournaments that it sponsors, it permits carts in the Senior Amateur and the Senior Women's Amateur championships.

Petitioner, however, distinguishes the game of golf as it is generally played from the game that it sponsors in the PGA TOUR, NIKE TOUR, and (at least recently) the last stage of the Q-School—golf at the "highest level." According to petitioner, "the goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules." The waiver of any possibly "outcome-affecting" rule for a contestant would violate this principle and therefore, in petitioner's view, fundamentally alter the nature of the highest level athletic event. The walking rule is one such rule,

petitioner submits, because its purpose is "to inject the element of fatigue into the skill of shot-making," and thus its effect may be the critical loss of a stroke. As a consequence, the reasonable modification Martin seeks would fundamentally alter the nature of petitioner's highest level tournaments even if he were the only person in the world who has both the talent to compete in those elite events and a disability sufficiently serious that he cannot do so without using a cart.

The force of petitioner's argument is, first of all, mitigated by the fact that golf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome. For example, changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two. Whether such happenstance events are more or less probable than the likelihood that a golfer afflicted with Klippel-Trenaunay-Weber Syndrome would one day qualify for the NIKE TOUR and PGA TOUR, they at least demonstrate that pure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule.

Further, the factual basis of petitioner's argument is undermined by the District Court's finding that the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant. The District Court credited the testimony of a professor in physiology and expert on fatigue, who calculated the calories expended in walking a golf course (about five miles) to be approximately 500 calories—"nutritionally ... less than a Big Mac." What is more, that energy is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment. In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients. And even under conditions of severe heat and humidity, the critical factor in fatigue is fluid loss rather than exercise from walking.

Moreover, when given the option of using a cart, the majority of golfers in petitioner's tournaments have chosen to walk, often to relieve stress or for other strategic reasons.

Even if we accept the factual predicate for petitioner's argument—that the walking rule is "outcome affecting" because fatigue may adversely affect performance—its legal position is fatally flawed. Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, 42 U.S.C. §12101(b)(1), and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered," §12182(b)(2)(A)(ii). To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.

To be sure, the waiver of an essential rule of competition for anyone would fundamentally alter the nature of petitioner's tournaments. As we have demonstrated, however, the walking rule is at best peripheral to the nature of petitioner's athletic events, and thus it might be waived in individual cases without working a fundamental alteration. Therefore, petitioner's claim that all the substantive rules for its "highest-level" competitions are sacrosanct and cannot be modified under any circumstances is effectively a contention that it is exempt from Title III's reasonable modification requirement. But that provision carves out no exemption for elite athletics, and given Title III's coverage not only of places of "exhibition or entertainment" but also of "golf courses," its application to petitioner's tournaments cannot be said to be unintended or unexpected. Even if it were, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."

Under the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis, we have no doubt that allowing Martin to use a golf cart would not fundamentally alter the nature of petitioner's tournaments. As we have discussed, the purpose of the walking rule is to subject players to fatigue, which in turn may influence the outcome of tournaments. Even if the rule does serve that purpose, it is an uncontested finding of the District Court that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires. As a result, Martin's request for a waiver of the walking rule should have been granted.

The ADA admittedly imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities. But surely, in a case of this kind, Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

[Dissent by Justice Scalia, with whom Justice Thomas joined is omitted.]

Notes

1. In the case of *Brown v. 1995 Tenet ParaAmerica Bicycle Challenge*, 959 F. Supp. 496 (N.D. Ill. 1997), the court held that a cross country bike tour organizer was not a public accommodation.

2. In the Spring of 1998, the National Collegiate Athletic Association, reached a settlement with the Department of Justice regarding the NCAA initial-eligibility requirements. Individuals had complained that these requirements discriminate against students with learning disabilities. The NCAA agreed to adopt a policy of evaluating applications for waivers of eligibility filed by students with learning disabilities. One of the issues that was not resolved as a result of the settlement was whether the NCAA is a public accommodation within the meaning of Title III of the ADA. The NCAA has taken the position that it is not such an entity, but that it is willing to provide accommodations to student athletes with disabilities in determining eligibility on an individualized basis. There had been a number of challenges by students with learning disabilities that the NCAA core course and other requirements for scholarship eligibility have a disparate impact on students with disabilities. *Bowers v. NCAA*, 118 F. Supp. 2d 494 (D.N.J. 2000). In *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999), the court held that the NCAA does not have sufficient control of member schools to be a recipient of federal financial assistance, and in *Matthews v. NCAA*, 79 F. Supp. 2d 1199 (E.D. Wash. 1999), the court held that the NCAA is not a Title III entity. The Supreme Court ruling in *PGA v. Casey Martin, supra*, however broadly interpreted Title III coverage, and those cases in which the NCAA was found not to be covered by Title III may be called into question as a result. The issue has not yet been definitively resolved by the Supreme Court, and because the NCAA voluntarily changed its policies, there has been less litigation.

3. The application of Title III to the Internet and websites has been the subject of a number of judicial decisions, with inconsistent results. Compare *National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (subscription video streaming website is a place of public

accommodation; applying *Carparts* analysis; action sought to require closed captioning for all content on video streaming website; not an irreconcilable conflict between ADA requirements and those set by *Twenty-First Century Communications* and Video Accessibility Act), with *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), and *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (websites not a places of public accommodation).

The following decision was quite complex with respect to the Justices joining in various parts of the opinion and the decision. The final decision included four dissents by Justices Scalia, Rehnquist, O'Connor and Thomas. The reader should review the full opinion by all Justices to determine which parts of the decision were joined by which Justices. The following is only the opinion by Justice Kennedy, which reflects the basic general determination of a majority of the Court that cruise lines operating foreign-flag ships departing from, and returning to, United States ports, are subject to Title III of the Americans with Disabilities Act. Many statutory references and case citations are deleted from the edited excerpt.

Spector v. Norwegian Cruise Line Ltd.

545 U.S. 119 (2005)

JUSTICE KENNEDY

Our cases hold that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations, as contrasted with statutory requirements that concern the security and well-being of United States citizens or territory. While the clear statement rule could limit Title III's application to foreign-flag cruise ships in some instances, when it requires removal of physical barriers, it would appear the rule is inapplicable to many other duties Title III might impose. We therefore reverse the decision of the Court of Appeals for the Fifth Circuit that the ADA is altogether inapplicable to foreign vessels; and we remand for further proceedings.

I

The respondent Norwegian Cruise Line Ltd (NCL), a Bermuda Corporation with a principal place of business in Miami, Florida, operates cruise ships that depart from, and return to, ports in the United States. The ships are essentially floating resorts. They provide passengers with staterooms or cabins, food, and entertainment. The cruise ships stop at different ports of call where passengers may disembark. Most of the passengers on these cruises are United States residents; under the terms and conditions of the tickets, disputes between passengers and NCL are to be governed by United States law; and NCL relies upon extensive advertising in the United States to promote its cruises and increase its revenues. Despite the fact that the cruises are operated by a company based in the United States, serve predominately United States residents, and are in most other respects United States-centered ventures, almost all of NCL's cruise ships are registered in other countries, flying so-called flags of convenience. The two NCL cruise ships that are the subject of the present litigation, the Norwegian Sea and the Norwegian Star, are both registered in the Bahamas.

The petitioners are disabled individuals and their companions who purchased tickets in 1998 or 1999 for round-trip cruises on the Norwegian Sea or the Norwegian Star, with departures from Houston, Texas. Naming NCL as the defendant, the petitioners filed a class action in the United States District Court for the Southern District of Texas on behalf of all persons similarly situated. They sought declaratory and injunctive relief under Title III of the ADA, which prohibits discrimination on the basis of disability.

II

A

1

Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations, and public transportation services.

2

This Court has long held that general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake. The general rule that United States statutes apply to foreign-flag ships in United States territory is subject only to a narrow exception. Absent a clear statement of congressional intent, general statutes may not apply to foreign-flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port. This qualification derives from the understanding that, as a matter of international comity, "all matters of discipline and all things done on board which affect only the vessel or those belonging to her, and [do] not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged." This exception to the usual presumption, however, does not extend beyond matters of internal order and discipline. "If crimes are committed on board [a foreign-flag vessel] of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws."

The two cases in recent times in which the presumption against applying general statutes to foreign vessels' internal affairs has been invoked concern labor relations. The Court held that the general terms of the National Labor Relations Act (NLRA) did not govern the respective rights and duties of a foreign ship and its crew because the NLRA standards would interfere with the foreign vessel's internal affairs in those circumstances. These cases recognized a narrow rule, applicable only to statutory duties that implicate the internal order of the foreign vessel rather than the welfare of American citizens. The Court held the NLRA inapplicable to labor relations between a foreign vessel and its foreign crew not because foreign ships are generally exempt from the NLRA, but because the particular application of the NLRA would interfere with matters that concern only the internal operations of the ship. In contrast, the Court held that the NLRA is fully applicable to labor relations between a foreign vessel and American longshoremen because this relationship, unlike the one between a vessel and its own crew, does not implicate a foreign ship's internal order and discipline.

This narrow clear statement rule is supported by sound principles of statutory construction. It is reasonable to presume Congress intends no interference with matters that are primarily of concern only to the ship and the foreign state in which it is registered. It is also reasonable, however, to presume Congress does intend its statutes to apply to entities in United States territory that serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility of the United States, even if those entities happen to be foreign-flag ships.

Cruise ships flying foreign flags of convenience offer public accommodations and transportation services to over 7 million United States residents annually, departing from and returning to ports located in the United States. Large numbers of disabled individuals, many of whom have mobility impairments that make other kinds of vacation travel difficult, take advantage of these cruises or would like to do so. To hold there is no Title III protection for disabled persons who seek to use the amenities of foreign cruise ships would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled. The clear statement rule adopted by the Court of Appeals for the Fifth Circuit, moreover, would imply that other general federal statutes—including, for example, Title II of the Civil Rights Act of 1964—would not apply aboard foreign cruise ships in

United States waters. A clear statement rule with this sweeping application is unlikely to reflect congressional intent.

The relevant category for which the Court demands a clear congressional statement, then, consists not of all applications of a statute to foreign-flag vessels but only those applications that would interfere with the foreign vessel's internal affairs. This proposition does not mean the clear statement rule is irrelevant to the ADA, however. If Title III by its terms does impose duties that interfere with a foreign-flag cruise ship's internal affairs, the lack of a clear congressional statement can mean that those specific applications of Title III are precluded. On remand, the Court of Appeals may need to consider which, if any, Title III requirements interfere with the internal affairs of foreign-flag vessels. As we will discuss further, however, Title III's own limitations and qualifications may make this inquiry unnecessary.

B

1

It is plain that Title III might impose any number of duties on cruise ships that have nothing to do with a ship's internal affairs. The pleadings and briefs in this case illustrate, but do not exhaust, the ways a cruise ship might offend such a duty. The petitioners allege the respondent charged disabled passengers higher fares and required disabled passengers to pay special surcharges; maintained evacuation programs and equipment in locations not accessible to disabled individuals; required disabled individuals, but not other passengers, to waive any potential medical liability and to travel with a companion; and reserved the right to remove from the ship any disabled individual whose presence endangers the "comfort" of other passengers. The petitioners also allege more generally that respondent "failed to make reasonable modifications in policies, practices, and procedures" necessary to ensure the petitioners' full enjoyment of the services respondent offered. These are bare allegations, and their truth is not conceded. We express no opinion on the factual support for those claims. We can say, however, that none of these alleged Title III violations implicate any requirement that would interfere with the internal affairs and management of a vessel as our cases have employed that term.

At least one subset of the petitioners' allegations, however, would appear to involve requirements that might be construed as relating to the internal affairs of foreign-flag cruise ships. These allegations concern physical barriers to access on board. For example, according to the petitioners, most of the cabins on the respondent's cruise ships, including the most attractive cabins in the most desirable locations, are not accessible to disabled passengers. The petitioners also allege that the ships' coamings—the raised edges around their doors—make many areas of the ships inaccessible to mobility-impaired passengers who use wheelchairs or scooters. Removal of these and other access barriers, the petitioners suggest, may be required by Title III's structural barrier removal requirement. Although these physical barriers affect the passengers as well as the ship and its crew, the statutory requirement could mandate a permanent and significant alteration of a physical feature of the ship—that is, an element of basic ship design and construction. If so, these applications of the barrier removal requirement likely would interfere with the internal affairs of foreign ships. A permanent and significant modification to a ship's physical structure goes to fundamental issues of ship design and construction, and it might be impossible for a ship to comply with all the requirements different jurisdictions might impose. The clear statement rule would most likely come into play if Title III were read to require permanent and significant structural modifications to foreign vessels. It is quite a different question, however, whether Title III would require this. The Title III requirements that might impose permanent and substantial changes to a ship's architecture and design, are, like all of Title III's requirements, subject to the statute's own specific limitations and qualifications. These limitations may make resort to the clear statement rule unnecessary.

2

Title III requires barrier removal if it is "readily achievable." The statute defines that term as "easily accomplishable and able to be carried out without much difficulty or expense." Title III does not define "difficulty"..., but use of the disjunctive—"easily accomplishable and able to be carried out without much difficulty or expense"—indicates that it extends to considerations in addition to cost. Furthermore, Title III directs that the "readily achievable" determination take into account "the impact ... upon the operation of the facility."

Surely a barrier removal requirement under Title III that would bring a vessel into noncompliance with the International Convention for the Safety of Life at Sea (SOLAS), or any other international legal obligation, would create serious difficulties for the vessel and would have a substantial impact on its operation, and thus would not be "readily achievable." This understanding of the statute, urged by the United States, is eminently reasonable. If, moreover, Title III's "readily achievable" exemption were not to take conflicts with international law into account, it would lead to the anomalous result that American cruise ships are obligated to comply with Title III even if doing so brings them into noncompliance with SOLAS, whereas foreign ships—which unlike American ships have the benefit of the internal affairs clear statement rule—would not be so obligated. Congress could not have intended this result.

It is logical and proper to conclude, moreover, that whether a barrier modification is "readily achievable" under Title III must take into consideration the modification's effect on shipboard safety. A separate provision of Title III mandates that the statute's nondiscrimination and accommodation requirements do not apply if disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." This reference is to a safety threat posed by a disabled individual, whereas here the question would be whether the structural modification itself may pose the safety threat. It would be incongruous, nevertheless, to attribute to Congress an intent to require modifications that threaten safety to others simply because the threat comes not from the disabled person but from the accommodation itself. The anomaly is avoided by concluding that a structural modification is not readily achievable ... if it would pose a direct threat to the health or safety of others.

III

The Court of Appeals for the Fifth Circuit held that general statutes do not apply to foreign-flag ships in United States waters. This Court's cases, however, stand only for the proposition that general statutes are presumed not to impose requirements that would interfere with the internal affairs of foreign-flag vessels. Except insofar as Title III regulates a vessel's internal affairs—a category that is not always well defined and that may require further judicial elaboration—the statute is applicable to foreign ships in United States waters to the same extent that it is applicable to American ships in those waters.

Title III's own limitations and qualifications prevent the statute from imposing requirements that would conflict with international obligations or threaten shipboard safety. These limitations and qualifications, though framed in general terms, employ a conventional vocabulary for instructing courts in the interpretation and application of the statute. If, on remand, it becomes clear that even after these limitations are taken into account Title III nonetheless imposes certain requirements that would interfere with the internal affairs of foreign ships—perhaps, for example, by requiring permanent and substantial structural modifications—the clear statement rule would come into play. It is also open to the court on remand to consider application of the clear statement rule at the outset if, as a prudential matter, that appears to be the more appropriate course.

We reverse the judgment of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

Notes

1. The *Spector* decision leaves unresolved a number of issues, including the specifics of what accommodations must be provided and what barrier issues must be addressed. What is the best means of resolving those questions—federal design standards, case by case litigation, or other means? What is likely to be the difference in addressing standards related to the location of activities? For example, should a cruise ship be required to consider locating certain events, such as bingo games, in more accessible locations, where there is a choice of where to locate the activity? What about shore access? What would be required to make landing craft tender vessels accessible, or should cruise ships not be permitted to dock where accessible landings are not possible?

Should cruise lines be able to charge more for larger rooms that are designed to allow wheelchair access? Should they be required to ensure a choice of cabin prices for accessible cabins? What is the responsibility of entities (such as alumni organizations or colleges providing a semester at sea) to ensure that the vessels are accessible?

2. In an unusual case, a court held that Title III does not apply to the process of selecting contestants to participate on a network television quiz show through an automated phone system. The plaintiffs alleged that disabilities prevented them from being able to participate on an equal basis. *Rendon v. Valleycrest Productions, Ltd.*, 119 F. Supp. 2d 1344 (S.D. Fla. 2000). Would this mean that the quiz show could exclude, for example, an individual with a hearing impairment from the show as a contestant?

3. Courts have addressed the application of Title III of the ADA to an increasingly individualized set of situations. See *National Federation of the Blind v. Uber Technologies, Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (individuals with blindness who claimed the refusal to transport guide dogs and raised the issue of whether providers of this new type of taxi service is a public accommodation under Title III); *Dicarlo v. Walgreens Boot Alliance, Inc.*, 52 Nat'l Disability Law Rep. ¶105 (S.D.N.Y. 2016) (court dismissed a Title III claim regarding soda machines claimed to be inaccessible to individuals with visual impairments and holding that the ADA does not require installation of technology to allow individuals to use the machine independently); *Sawczyn v. BMO Harris Bank National Ass'n*, 8 F. Supp. 3d 1108 (D. Minn. 2014) (court addressed whether ATM machines must be accessible to individuals who are blind); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013) (addressing the application of FHA and ADA Title III to homeless shelters and finding no religious exemption); *Kalani v. Castle Village*, 14 F. Supp. 3d 1359 (E.D. Cal. 2014) (addressing whether a clubhouse, sales office, and other facilities of a mobile home park are subject to the private club exception).

B. Nondiscrimination

The previous section focused on whether an activity is considered to be one of the twelve categories within Title III of the ADA. In reviewing the cases on whether the program had discriminated or not, it is useful to review cases in earlier sections to assess whether the program had engaged in impermissible discrimination. Often that determination involves an interrelated analysis of whether the individual was otherwise qualified and whether reasonable accommodations could have been provided to ensure qualification and/or to ensure access. Hypothetical Problem 4.1 raises all of these issues.

The following is one of the first cases decided under the ADA involved a Title III claim. The case involved an individual who used a wheelchair due to a spinal cord injury, who had coached Little League Baseball for three years as an on-field base coach. Because of safety concerns, a policy was adopted allowing him to coach only from the dugout, but not from the coach's box. The plaintiff challenged this policy as violating the ADA.

Anderson v. Little League Baseball, Inc.

794 F. Supp. 342 (D. Ariz. 1992)

EARL H. CARROLL, DISTRICT JUDGE:

Discussion

Despite its prohibition against discrimination in public accommodations, Subchapter III provides:

> Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

In determining whether an individual, such as plaintiff, poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications of policies, practices, or procedures will mitigate the risk. 28 C.F.R. §36.208(c).

The Act's definition of "direct threat" codifies the standard first articulated by the United States Supreme Court in *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987), in which the Court held that a person suffering from the contagious disease of tuberculosis can be a handicapped person with the meaning of Section 504 of the Rehabilitation Act of 1973. The Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. "The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability; it must be based on an individual assessment that conforms to the requirements of [28 C.F.R. §36.208(c)]." An individualized inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear.

There is no indication in the pleadings, affidavits, or oral arguments presented by the parties that defendants conducted an individualized assessment and determined that plaintiff poses a direct threat to the health and safety of others. In fact, there is no indication that defendants undertook any type of inquiry to ascertain "the nature, duration, and severity of the risk" posed by plaintiff; "the probability that the potential injury will actually occur;" or "whether reasonable modifications of policies, practices, or procedures will mitigate the risk" allegedly posed by plaintiff. Defendants' policy amounts to an absolute ban on coaches in wheelchairs in the coachers box, regardless of the coach's disability or the field or game conditions involved. Regrettably, such a policy—implemented without public discourse—falls markedly short of the requirements enunciated in the Americans with Disabilities Act and its implementing regulations.

The Court gives great weight to the fact that plaintiff has served as a Little League coach at either first base or third base for three years without incident. Moreover, plaintiff's significant contributions of time, energy, enthusiasm, and personal example benefit the numerous children who participate in Little League activities as well as the community at large. Plaintiff's work with young people teaches them the importance of focusing on the strengths of others and helping them rise to overcome their personal challenges.

The Court has no doubt that both plaintiff and the children with whom he works will suffer irreparable harm if defendants are permitted to arguably discriminate against plaintiff based upon his disability. Such discrimination is clearly contrary to public policy and the interests of society as a whole. In particular, such discrimination is contrary to the interests of plaintiff and everyone who is interested or participates in Little League activities, including the defendant organization and its

officers.

The Court anticipates that the parties will respect these interests and cooperate so that the tournament will begin on schedule and the games will be played as they were during the regular season.

It Is Ordered that plaintiff's Application for Temporary Restraining Order is granted. Defendants are enjoined from preventing or attempting to prevent plaintiff from participating fully, coaching on the field, or otherwise being involved to the full extent of his responsibilities as coach, under the auspices of Little League Baseball, Inc. Furthermore, defendants are enjoined from intimidating or threatening players, parents of players, coaches, officials, umpires, or other persons involved in Little League Baseball and from attempting to induce them to boycott games because of plaintiff's participation.

Problems

1. Is the Little League in violation of the ADA by providing official uniforms, caps, and insignias to players in the regular league, but not to those in a special league created for individuals with disabilities? *Suhansky v. Little League Baseball Inc.*, No. C.A. 393CV01255 (D. Conn. filed June 25, 1993). Must the Little League provide a separate program in the first place?

2. In any of the Little League cases, is there a Title II claim against the city if it allows the Little League program known to be discriminating to use city operated recreational facilities?

3. In a September 22, 1986, Ann Landers column, several letters responded to a previous column in which Ann had "told off a 'Chicago Reader' who complained about having her appetite spoiled by the sight of a woman with a disability whose husband was feeding her in the restaurant." One response states that "I am a picky eater with a queasy stomach.... The sight of a woman in a wheelchair with food running down her chin would make me throw up." Another suggested that "restaurants should have a special section for handicapped people—partially hidden by palms or other greenery so they are not seen by other guests." *Ask Ann Landers*, HOUSTON CHRONICLE, Sept. 22, 1986, at D2.

While Ann Landers had a lot of influence, she was not a judge. Would exclusion of the woman by a restaurant be permissible under the ADA? What about the suggestion to have a special section, would that be permitted under Title III?

4. In 1985, environmentalists tried to stop air tour operators from flying groups below the rim of the Grand Canyon. The environmentalists argued that the activity spoiled the quiet of the canyon as well as adversely affecting wildlife. The air tour operators countered by claiming that a ban on such flights would mean that senior citizens and individuals with disabilities would not have the same access to the canyon as those who could hike the trails or take mule rides into the canyon.

If such flights were banned, what is the likely outcome of an individual suit based on discrimination? Would this be a Title III case or would some other avenue for redress be required? See *Plane Flights in Grand Canyon Spur Debate*, N.Y. TIMES, Nov. 3, 1985, at I30. The proposed regulations for wilderness areas are found at 61 Fed. Reg. 66968 (Dec. 19, 1996). They are found in final form at 36 C.F.R. 1.2.

5. Would it violate the ADA for an amusement park to demand medical documentation that a child was fit to be on the rides where the request was made because the child appeared to have an intellectual disability? What if the child appeared to have severe mobility problems? Would it matter whether it was the roller coaster or the carousel?

6. *Newspapers as Public Accommodations:* In *Treanor v. Washington Post Co.*, 826 F. Supp. 568 (D.D.C. 1993), the court held that a newspaper column is not a public accommodation under Title III of the ADA. Because a newspaper column is not covered, an editorial decision not to publish a review of a book written by an author who is disabled could not be challenged under the ADA. The court

also raised concerns about the First Amendment. Does that mean that a newspaper that refuses to include obituaries of individuals who die of HIV complications would not be subject to a Title III challenge? What about a practice that a newspaper would not publish an obituary of anyone under the age of 40 without being advised of the cause of death?

Notes

1. *A Day at the Movies?* A group trip of individuals with intellectual disabilities to the movies resulted in a negative experience at a Kansas City theater in 1992. Five individuals from a neurological center were turned away from a movie theater because they had made noise in the ticket line. An employee thought they would be disruptive and refused to sell them a ticket. Is this a violation of Title III? Donald Bradley, *Theater Turns Away Disabled*, KANSAS CITY STAR, March 25, 1992, at C1.

2. *Mother's Day Discrimination:* The New York City Commission on Human Rights found a florist in violation of state law by refusing to allow a patron in a wheelchair to enter the store, claiming it was too crowded. This occurred on Mother's Day in 1991. The patron claimed that when he tried to enter, the florist yelled, "No wheelchairs allowed in here—you will break everything." The florist was ordered to pay $5,000 to the customer, but a $3,000 settlement was reached. *No Bouquets for Florist*, NEWSDAY, Feb. 4, 1994, at A22.

C. Reasonable Accommodations

[1] Modification of Policies, Practices, and Procedures

Title III of the ADA prohibits as discriminatory the refusal to make reasonable modifications in policies, practices, or procedures necessary to afford access to individuals with disabilities. 42 U.S.C. §12182(b)(2)(A)(ii). For example, the refusal to accept a state identification card by a business that usually requires a driver's license to write checks would almost always be viewed as discriminatory. *United States v. Venture Stores*, 1994 U.S. Dist. LEXIS 3053, 3 Am. Disabilities Cas. (BNA) 768 (N.D. Ill. 1994).

In a separate section of Title III, it is required that providers of examinations or courses relating to applications, licensing, certification, or credentialing for secondary, postsecondary education, professional, or trade purposes must make these services available in a place and manner accessible to individuals with disabilities. 42 U.S.C. §12189. In 1994, two settlement agreements were reached in response to cases involving a bar exam test prep program and a CPA test prep program and requests for auxiliary services such as interpreters. *United States v. Harcourt Brace Legal & Prof. Publications, Inc.*, No. CA-94-C-3295 (N.D. Ill. settled May 27, 1994); *United States v. Becker C.P.A. Review*, No. CV-92-2879 (D.D.C. settled May 16, 1994). Cases addressing professional exam modifications have addressed issues such as testing time and format modifications, provision of auxiliary services such as interpreters, and other accommodations. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §5:7 (2012 and cumulative supplement) (citing cases on these and other issues).

The following decision illustrates that issues of undue hardship are not the only consideration. Considerations of public safety also are relevant. The case involved an individual with a severe hearing impairment seeking admission to a training program for drivers of tractor-trailer vehicles. Part of the training included having students drive on public roads with individualized instruction. Students spent a substantial amount of time on public roads during this training. The individualized analysis of the facts of the case addresses both an issue of providing an auxiliary aid and a modification (by waiving certain aspects of the course).

Breece v. Alliance Tractor-Trailer Training II, Inc.

824 F. Supp. 576 (E.D. Va. 1993)

HILTON, DISTRICT JUDGE:

Findings of Fact

6. During the interview, Mr. Patrick questioned Breece's qualifications for admission because of the impairment. Mr. Breece proposed that his hearing impairment could be accommodated by having a sign language interpreter in the cab of the tractor-trailer during the public road training segment of the course. He suggested that the truck cab could be modified so that the instructor could stand behind him and plaintiff could continually "glance around" at the interpreter in order to understand the instructor's instructions, questions, comments, and warnings.

7. Mr. Patrick and Mr. Pressley gave Mr. Breece a tour of Alliance's facilities and pointed to Mr. Hoback, Alliance's training director and chief instructor, while he was teaching a class, and said that Mr. Breece should return to meet with Mr. Hoback to discuss his application and suggested modification to accommodate his hearing impairment.

8. Mr. Breece never contacted Mr. Hoback or returned to Alliance. Finally, after Mr. Patrick and Mr. Pressley consulted with Mr. Hoback, Alliance concluded that it could not safely accommodate Mr. Breece's hearing impairment during the integral public road training segment of the course and thereafter rejected Mr. Breece's application.

11. Mr. Breece demonstrated at trial the extent of his hearing impairment. Despite having his attorney stand next to him at the witness stand in the stillness of the courtroom, Mr. Breece could not understand and repeat some of the words his attorney called out in a loud voice. Even with a sign-language interpreter, Mr. Breece had difficulty understanding the questions he was asked in court.

12. Dr. Allen R. Robinson teaches education courses in automobile, motorcycle, and truck driving at Indiana University of Pennsylvania. Since beginning his career in traffic safety education in 1964, he has trained individuals to drive cars, motorcycles, medium trucks and developed instructor training programs. Dr. Robinson's only experience training tractor-trailer drivers was a summer course for 28 individuals at the National Institutes of Health.

13. Dr. Robinson testified at trial that Mr. Breece could be safely accommodated with an earphone amplification device on Alliance's trucks, a truck driving simulator, and expanded in-class training. Mr. Robinson thought that these accommodations could even substitute for the road driving segment of the course.

14. Alliance's officers testified at trial that truck simulators have little pedagogical value because they lack the requisite fear element of truck driving on the interstate highway system.

15. Alliance's Mr. Jack Hoback testified that the modifications sought by Mr. Breece would not only be unsafe, but would fundamentally alter the nature of Alliance's road driving oriented tractor-trailer training program.

16. Mr. Jack Hoback has been an instructor at Alliance for a decade and has trained over 4,000 students how to drive a tractor-trailer. Prior to becoming a driving instructor, Mr. Hoback was a tractor-trailer truck driver for 11 years and trained other truck drivers for his employers. Before becoming a truck driver, Mr. Hoback attended a truck driving school. Mr. Hoback has experience driving over 2,000,000 miles of public roads on a tractor-trailer.

17. Mr. Hoback described the importance of the public road driving segment of the course and how it cannot be replaced by expanded in-class training. He said that regardless of the amount of in-class training prior to driving trucks on the road, every one of his thousands of students has gotten into a morass when driving on the road that has required personal interaction and instruction with the in-cab trainer making quick commands to get out of it. These intense situations constitute the major

pedagogical benefit of Alliance's road training segment.

18. Mr. Hoback further testified that based upon the evidence available to him he determined that the modifications requested by Mr. Breece and Mr. Breece's inability to understand an instructor in a truck cab with the engine running balanced against the severity of risking a major accident on a public highway in a tractor-trailer led to his conclusion that Mr. Breece's admission to the school would constitute a direct threat to public safety.

19. Mr. Hoback testified that Mr. Breece's inability to repeat words his lawyers said at trial provided him with further evidence that Mr. Breece would be unable to understand his instructors in a tractor-trailer and that it would be impossible to communicate with him during the public road driving segment of the course, even with a sign language interpreter.

20. Mr. Hoback thought that an earphone voice amplification system would be unsafe and possibly illegal.

Conclusions of Law

The Americans with Disabilities Act prohibits discrimination by public accommodations on the basis of a disability. The Act specifies that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures" when the modifications are necessary to afford the services to individuals with disabilities "unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. §12182(b)(2)(A)(ii). This section extends the Rehabilitation Act of 1973's prohibition against discrimination on the basis of disabilities to public accommodations and services operated by private entities.

Both the text of the Americans with Disabilities Act and precedent interpreting the Rehabilitation Act forbid courts from requiring a fundamental alteration in a defendant's program to accommodate a handicapped individual. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Supreme Court found that a nursing school did not illegally discriminate against a rejected hearing impaired nursing applicant who could communicate only by reading lips and sign language by refusing to modify its program in such a way as to "dispense with the need for effective oral communication" with a nursing instructor. Even though the nursing applicant could read lips, the nature of the clinical phase of the training program required that students be able to "instantly follow" instructions. Justice Powell said that the Rehabilitation Act "imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."

Mr. Breece contends that his hearing impairment can be accommodated by: 1) a driving simulator; 2) more direction or instruction before taking the wheel; 3) a sign language interpreter standing with him in the truck cab; or 4) a speaker on his shoulder near his less hearing impaired ear amplifying his instructor's voice.

Although Dr. Robinson, Mr. Breece's expert witness, testified that Mr. Breece's hearing impairment can be accommodated, Dr. Robinson's has had both significantly less tractor-trailer driving and teaching experience than Mr. Hoback. The testimony of Mr. Hoback is thus entitled to greater weight than Dr. Robinson's testimony.

Mr. Breece's hearing impairment cannot be accommodated without fundamentally altering the nature of Alliance's intensive training program of driving tractor-trailers on the road accompanied by an instructor. Expanded theoretical classroom training could not substitute for the actual road driving experience that is the integral part of Alliance's training program. A simulator based training program substituting for the road segment would also fundamentally alter the school's program because such a simulator lacks the fear element of driving a tractor trailer which is essential to graduating competent drivers from the training course.

In addition, nothing in the Americans with Disabilities Act requires "an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." 42 U.S.C. §12182(b)(3). A "direct threat" is a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."

These provisions dealing with direct threats to public safety codify the standards requiring an "individualized inquiry" about the handicapped plaintiff expressed by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The finding of a direct threat is to be based on a reasonable judgment relying either upon current medical evidence or "on the best available objective evidence, to determine: the nature, duration and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk."

Alliance made a reasonable judgment based on the best available objective evidence upon Mr. Breece's application and interview that any accommodation for his disability during the road driving segment would pose a direct threat to the safety of himself, his instructor, and the public at large on the public highway system. Mr. Breece could not possibly keep his eyes on the road, gauges, and mirrors and simultaneously watch a sign-language interpreter translating his teacher's instructions. The severity of Mr. Breece's hearing impairment would also make voice amplification devices useless in a noisy truck cab. Because Mr. Breece would be unable to communicate with his instructor in the cab, his presence on the road would constitute a direct threat to public safety.

Because accommodations could not be made to Alliance's tractor-trailer training program without fundamentally altering that program or posing a direct threat to public safety, the court concludes that the defendant has not violated the Americans with Disabilities Act by rejecting the plaintiff's application.

Problem

What if Mr. Breece was already licensed and then became deaf through an accident or illness? Could the licensing agency revoke his license? To what degree does the ability to get a license relate to the educational course that leads up to the license? Can that be a factor in denying admission or an accommodation?

Notes

1. *Allowing vehicles as a modification of policies.* In 2010, regulations were issued to clarify when vehicles such as Segway® and power drive wheelchairs must be allowed in certain settings. See 28 C.F.R. §35.137, §36.311. Issues of safety were significant in these regulations. Relevant factors for entities being requested to allow them include the type, size, weight, and speed of the device, the volume of pedestrian traffic, the facility's design and operation, and risk factors. The regulations also clarify what kind of inquiries can be made in making such a modification.

Only a few judicial decisions have addressed the interpretation of these regulations. In *Baughman v. Walt Disney World Co.*, 685 F.3d 1131 (9th Cir. 2012), the court addressed the use of Segways at Disney parks. In its decision, the appellate court rejected use of "necessary" as determining whether an accommodation must be granted, holding instead that the focus should be on whether the ADA requires more than mere access. A class action involving the use of Segways in Disney parks found another circuit court addressing this issue. In *Ault v. Walt Disney World Co.*, 692 F.3d 1212 (11th Cir. 2012), the court upheld a settlement that had allowed a ban on two-wheeled vehicles in exchange for development of four-wheeled electric stand-up vehicle for those for whom it would be a necessity and noted that safety risks were being considered.

2. *Allowing animals as a policy modification. It's a Dog's World:* In a case decided under New York State Law, the court may have reached the right decision, but for the wrong reasons. In *Perino v. St. Vincent's Medical Center*, 132 Misc. 2d 20, 502 N.Y.S.2d 921 (Sup. Ct. 1986), a blind man wanted to have his guide dog accompany him to the delivery room of a hospital where his wife was to give birth. The court held that the delivery room of a hospital was not a public facility subject to the state's nondiscrimination in public accommodations law. Therefore, it was not a violation of the statute to deny the requested accommodation. Surely if the hospital had denied a blind woman access to the delivery room, she would have succeeded in a discrimination claim under the same statute. What seems more valid would be a decision that denied access based on reasonable concerns about safety and health in a crowded delivery room. Although the *Perino* case allowed the dog to be excluded, the special circumstances of the case should be taken into account. A hospital delivery room is quite different from many other places of accommodation. Generally speaking, service animals will be allowed in such places as a modification of usual business practice. While most operators of public accommodations are familiar with seeing eye dogs and readily permit them to enter, problems can occur with other service animals, especially where the need for the animal is not as obvious. A restaurant owner who refused to allow Lucky, the dog, to enter found himself on the receiving end of a fine. He had refused to even look at the owner's ID card explaining a state law requiring access for animals assisting people with hearing impairments. In court, the dog demonstrated his assistance abilities and showed that he could behave in a public place. Deborah Quinn Hensel, *Dog Proves He's Man's Best Friend—in Court*, HOUSTON POST, Nov. 11, 1993, at A29. The ADA probably would result in a consistent ruling. It should be noted that while modification of "no animals" policies is probably going to be required in most instances, the operators of public accommodations will not be responsible for caring for the animals.

In *Thompson v. Dover Downs, Inc*., 31 Nat'l Disability L. Rep. ¶135 (Del. 2005), a casino denied entry to an individual accompanied by a four-month-old dog. The puppy arrived wearing a vest indicating that it was a support animal. The security guard asked what the dog was trained to do, and when the individual refused to answer, the dog was not allowed entry. The court held that while it was not permissible to ask about one's disability, it is permitted to ask about training.

In *Lentini v. California Center for the Arts*, 370 F.3d 837 (9th Cir. 2004), the court allowed service animals to be in a concert hall where disruptive noises would have been acceptable if engaged in by humans.

In *Johnson v. Gambrinus Co.*, 116 F.3d 1052 (5th Cir. 1997), Judge Carolyn King held that a brewery's policy of denying access to individuals with guide dogs violated Title III of the ADA. The court held that modifying its "no animals" policy did not jeopardize safety. The court noted that the marginal increase in the risk of contamination resulting from such an accommodation did not justify the refusal to modify the policy.

On July 23, 2010, the Department of Justice issued final regulations on service animals. The regulations became effective March 15, 2011. 75 Fed. Reg. 56,164–236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236–358 (September 15, 2010) (Title III). These regulations amend both Title II and Title III regulations. Service animals are defined as those individually trained to do work or perform tasks for the benefit of an individual with a disability (including a psychiatric disability). 28 C.F.R. §35.104 and §36.104. The only other animals where reasonable accommodations may have to be considered are miniature horses, and the regulations specify guidance on when accommodating such animals would be appropriate. 28 C.F.R. §35.136(i) and §36.302(c)(9). The regulations relating to service animals clarify what animals are protected, that the animal must be trained to perform a service, when service animals may be removed, provisions relating to the care and supervision of such animals, documentation that can be required and inquiries that can be made about service animals, what health and safety concerns are valid, and where such animals can have access. 28 C.F.R. §35.136 and §36.302(c).

Accommodation requirements regarding animals in employment and housing settings are not the same as those for public service providers and programs of public accommodation. In employment and housing settings (which do not yet have regulatory guidance) animals other than dogs and horses might be required to be allowed and more documentation might be permissible. The animal might not be required to be trained to do something and could be an accommodation based on the emotional support that the animal provides. Campus housing raises even more complex and as yet unresolved issues.

A number of judicial decisions have interpreted the 2010 regulations on issues involving service animals with a range of outcomes. These include *O'Connor v. Scottsdale Healthcare Corp.*, 582 Fed. Appx. 695 (9th Cir. 2014) (service animal at hospital). Difficulties are arising about documentation that can be requested in some cases. In *Davis v. Ma*, 848 F. Supp. 2d 1105 (C.D. Cal. 2012), *aff'd*, 568 Fed. Appx. 488 (9th Cir. 2014), the court found that a store customer's puppy was not a trained service animal, that the puppy was not fully vaccinated, and the doctor's note did not explain how the puppy ameliorated back issues. Ordinarily an individual is not required to have documentation, but perhaps where the service to be provided is not apparent, some documentation may be requested. See also *Sak v. City of Aurelia, Iowa,* 832 F. Supp. 2d 1026 (N.D. Iowa 2011) (local laws prohibiting specific breeds are inconsistent with ADA guidance on service animals). The issue of exemptions from restrictions related to animals has arisen in an array of contexts, indicating that this is becoming an increasingly important issue. See *National Federation of the Blind v. Uber Technologies, Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (granting associational standing of organization representing blind persons; leaving open the question of whether provider of taxi services was a public accommodation under Title III; allegations that service refused to transport guide dogs); *Cordoves v. Miami-Dade County*, 104 F. Supp. 3d 1350 (S.D. Fla. 2015) (addressing expert testimony of plaintiff who was not qualified to testify about dog's status as service dog when animal had been denied access to shopping mall); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013) (FHA and ADA Title III case by man with a visual impairment who was seeking shelter in a homeless shelter; no religious exemption; no demonstration of undue burden to accommodate man and his service dog).

The Department of Veterans Affairs issued final regulations about the presence of animals on VA property to update the application to service dogs in addition to seeing-eye dogs. 38 C.F.R. §1.218(a)(11).

See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §5:5 (2012 and cumulative supplement) (citing cases on these and other issues).

The regulations indicate that where animals are allowed, the program or entity is not required to assist with the animal. What if the animal is for a young child in school who would not be able to leave the building to toilet the dog without assistance? The Supreme Court will determine this issue. See *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015), *cert. granted,* 136 S. Ct. 923 (2016) (requiring parents to exhaust administrative remedies under IDEA before pursuing ADA/504 remedies; school refused to allow student with cerebral palsy to be accompanied by her assistance dog).

3. *Fast Food Drive Through Accommodation.* In March of 1994, Burger King entered into a settlement, agreeing to develop, test, and implement an electronic ordering system to assist individuals with hearing and speech impairments. *Sacchetti v. King*, No. CV-93-7667-SVM (C.D. Cal. settled March 22, 1994).

The case of *Bunjer v. Edwards*, 985 F. Supp. 165 (D.D.C. 1997), involved a deaf customer at a Washington, D.C. McDonald's restaurant, who was arrested after a dispute involving the restaurant's treatment of him when he attempted to order food through the drive-through facility. When he tried to order by driving directly to the drive-through window and giving a written order, he was initially refused, eventually served, snickered at by employees, allegedly given the wrong change and warm

water with a white substance instead of the Sprite he had ordered. When he went inside to complain, his dissatisfaction with the restaurant's handling of his complaint eventually resulted in his refusal to leave and an arrest. The court in finding that he had been discriminated against, noted the following:

> Under the current system, deaf and hearing impaired patrons have no way to make use of the drive-through facility. There is an easy way to make provision for these patrons. All that needs to be done is for the restaurant to put up a sign at the initial speaker/menu point instructing deaf patrons to proceed directly to the window to have their orders filled.
>
> Additionally, the employees of Defendant's McDonald's franchise were inadequately trained to deal with the special needs of deaf and hearing impaired patrons. Defendants' McDonald's restaurant is located in close proximity to Gallaudet University, the foremost national university devoted entirely to the deaf and the hearing impaired. Despite the numerous deaf patrons at the restaurant, Defendant has in place no policies or training to instruct employees about the special needs of such customers. The circumstances in this case illustrate that the employees of Defendants' restaurant were far from capable of dealing effectively with deaf patrons. Had Defendants provided adequate training to their employees, the offensive treatment of the Plaintiff that occurred in this case might have been avoided. Accordingly, the Court will order Defendants to implement policies and provide training for their employees to accommodate the deaf and hearing impaired. Although the injunction will be limited to Defendants' McDonald's franchise, [because] ("[A] nationwide or companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the statute."), the Court hopes that it will serve as a "wake-up call" for the national McDonald's Corporation to put in place training and other appropriate procedures for dealing with the deaf and the hearing impaired. It was conceded at trial that the parent McDonald's Corporation provides no training to its own employees or its franchise proprietors with respect to dealing with the deaf and hearing impaired.

Should the duty to provide training be any different because the restaurant is located where there will likely be a number of deaf customers?

What modifications of policies might be required for fast food restaurants that operate only drive through service after certain hours, yet prohibit individuals who are blind from using this service? http://www.usatoday.com/story/money/nation-now/2016/06/01/blind-man-sues-mcdonalds-service-drive-thru-window/85240334/.

4. *Not Everyone Loves Peanut Butter.* Most people think of peanut butter as a staple food for children. Unfortunately, some children are severely allergic to peanut products and the reaction could be so severe as to result in death. In the 1997 settlement in *United States v. La Petite Academy, Inc.*, the child care program with 750 locations nationwide, agreed to implement procedures to ensure that children with such allergies could be accommodated. The program also agreed to implement procedures relating to glucose testing of children with insulin-dependent diabetes. A related issue involves allowing children to carry and use Epi-Pens at camp or school as an accommodation to a policy that prohibits children from having or administering medication.

Would it be permissible to prohibit attendees at a conference from wearing scented products? Employees in a work setting? If not, how might individuals with severe adverse reactions to chemical products be accommodated?

5. *Golf Carts and Fundamental Alterations.* The Court's opinion in *PGA Tour, Inc. v. Martin* earlier in the chapter addresses whether the PGA is a public accommodation within Title III. The case should be reviewed at this point. Note that the Court makes a careful individualized assessment not only on whether carrying clubs is fundamental to the game of golf, but also on whether Casey Martin was unfairly advantaged by riding a golf cart instead of walking. The individualized assessment was that Martin still suffered substantial fatigue in spite of riding a golf cart, and thereby was not unfairly advantaged.

6. *Motorized Devices.* The use of Segways and similar devices in public places is becoming more

of an issue. The court in *McElroy v. Simon Property Group, Inc.*, 37 Nat'l Disability L. Rep. ¶235 (D. Kan. 2008), denied a motion to dismiss a case brought by an individual who was required to sign an indemnification form when using a Segway at the mall. Other issues include complete prohibition of Segways.

On July 23, 2010, the Department of Justice issued final ADA regulations on the use of mobility devices, including Segways®. The regulations became effective March 15, 2011. 75 Fed. Reg. 56,164–236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236–358 (September 15, 2010) (Title III). These regulations amend both Title II and Title III regulations. See 28 C.F.R. §35.137 and §36.311. Entities are allowed to consider the type, size, weight, and speed of the device, the volume of pedestrian traffic, the facility's design and operation, and risk factors. Further requirements clarify what kind of inquiries can be made in making such a modification.

See also *Ault v. Walt Disney World Co.*, 43 Nat'l Disability L. Rep. ¶48 (M.D. Fla. 2011), in which the court addressed the conflict between the Department of Justice revised regulations on use of power-driven mobility devices and the plain language of Title III which requires modifications only if they are necessary. The court found that the new regulations are not entitled to deference and that the ban on these devices based on legitimate safety concerns is not a Title III violation because the device is not necessary.

Problem

Don't Roll in My Parade: Sponsors of parades often have restrictions against wheeled vehicles. If an individual with a disability requested to be in the parade using a wheelchair, would it violate the ADA to deny this accommodation? What if the parade sponsor claimed that this would slow down the parade and thus adversely affect television coverage? See *Handicapped Group Left Out of Parade—Too Slow for TV*, L.A. TIMES, Nov. 20, 1985 at I2.

See also Laura Rothstein, *Don't Roll in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 REVIEW OF LITIGATION (University of Texas) 400 (2000). The article examines litigation and advocacy involving sports and entertainment cases under the ADA and how the print media have covered these cases. The article discusses cases involving impaired athletes and issues related to sports venues and movie theatres. The conclusion of the review is that while there has been some adverse media coverage about the ADA, the media coverage of issues relating to sports and entertainment has given a more positive light to the ADA and has increased awareness and support by the public.

[2] Auxiliary Aids and Services

The issue of reasonable accommodations contemplates a consideration of the provision of auxiliary aids and services in addition to modification of policies, practices and procedures. This assessment is more likely to involve consideration of undue burden, as the following case highlights.

The unique challenges of daycare programs as a public accommodation have been at issue in several cases, although most of these cases seem to have reached settlement, so there is little judicial guidance on this issue. One of the few cases to address daycare settings is *Roberts v. Kindercare Learning Centers, Inc.*, 896 F. Supp. 921 (D. Minn. 1995). The parents of a four year old child with developmental delays, seizures, attention deficit hyperactivity disorder, and other behavior problems, and who was not toilet trained sought to enroll Brandon and requested the availability of a one-on-one Personal Care Attendant (PCA) to accompany him on a continuous basis. The following is the court's response. The PCA was paid for by the school system and was part of the Individualized Educational Program (IEP). The issue for this court was whether the day care program was required to accommodate the child by providing one-on-one staffing when the school-provided PCA was unable to be present.

Roberts v. Kindercare Learning Centers, Inc.

896 F. Supp. 921 (D. Minn. 1995)

MAGNUSON, CHIEF JUDGE.

Findings of Fact

On May 11, 1994, Ms. Rodenberg-Roberts contacted KinderCare Learning Centers, Inc. ("KinderCare"), in Apple Valley, Minnesota, and spoke with Center Director Ann Marie Donahue to enroll Brandon. KinderCare is a for-profit corporation operating day care centers throughout the United States, including the State of Minnesota. KinderCare provides a "public accommodation" within the meaning of the ADA and the MHRA. KinderCare generally provides group child care, as opposed to individualized, or one-on-one child care. Ms. Rodenberg-Roberts was acquainted with the Apple Valley KinderCare; the Roberts had enrolled Becky, Brandon's sister, there, and were satisfied with the care KinderCare had been providing her. Becky, too, was a special-needs child, having Spina Bifida and a tendency to run away. However, Becky did not require the one-on-one care that Brandon required.

Ms. Donahue informed Ms. Rodenberg-Roberts that the center had room for another child. Ms. Rodenberg-Roberts advised Ms. Donahue of Brandon's special needs, including his continuous need for one-on-one personal care while participating in day care as directed by his IEP. Among other things, she also informed Ms. Donahue that Brandon had a traumatic brain injury, a seizure disorder, a tendency to bolt, but that he was "not terribly disruptive." Ms. Rodenberg-Roberts also advised Ms. Donahue that they had been dissatisfied with the decision of Children's World's to provide Brandon's one-on-one care in the office with a staff member when his PCA was absent.

Ms. Rodenberg-Roberts requested that Ms. Donahue enroll Brandon at the Apple Valley KinderCare on a "full-time" basis. However, Ms. Rodenberg-Roberts did not suggest that "full-time" had anything but its common meaning, and Ms. Donahue believed Ms. Rodenberg-Roberts was seeking day care for Brandon for 40 to 50 hours per week. Ms. Rodenberg-Roberts' request for "full-time" child care without any attempt to clarify her meaning, despite further discussions and correspondence with KinderCare regarding its responsibility to provide one-on-one care for Brandon at all times his PCA would be absent, caused KinderCare decision-makers reasonably to conclude Ms. Rodenberg-Roberts was requesting Brandon be enrolled for 40 hours per week. Ms. Rodenberg-Roberts also advised Ms. Donahue that while a PCA ordinarily would accompany Brandon, the Roberts currently did not have a PCA for Brandon, and that they were seeking to acquire one who would accompany Brandon to KinderCare for 30 hours per week. Ms. Roberts requested KinderCare provide the one-on-one care Brandon required for all times a PCA did not accompany him. Thus, based on Ms. Rodenberg-Roberts' representations to KinderCare about the need for "full-time" day care service and the understanding that PCA service is occasionally disrupted due to illness, turnover, or as anticipated from past PCA unreliability to the Roberts, and the additional fact that the Roberts sought PCA service for only about 30 hours per week, KinderCare would likely have to provide substantial one-on-one care for Brandon.

KinderCare does not provide one-on-one care on a regular basis for any child, but does provide one-on-one care for brief periods due to injuries or immediate disciplinary problems. The wages of a KinderCare full-time aid employed for Brandon's one-on-one care would have been about $200 per week, or nearly double the revenue KinderCare would earn in tuition for Brandon's care. Never having faced the issue of substantial one-on-one care, Ms. Donahue contacted Dee Ann Besch, a KinderCare regional director. Several telephone discussions took place between Ms. Besch, Ms. Donahue and Ms. Rodenberg-Roberts. On May 20, 1994, Ms. Donahue informed Ms. Rodenberg-Roberts that KinderCare would enroll Brandon, but that Brandon could attend KinderCare only when accompanied by a PCA; KinderCare would not provide an employee to care for Brandon on a one-on-

one basis in the absence of a PCA. Ms. Rodenberg-Roberts testified that both she and her husband needed to work, and therefore it would be unacceptable to them to come to assist with Brandon at KinderCare or pick up Brandon in the event his PCA would become ill or would otherwise be unable to accompany Brandon at KinderCare.

One year before KinderCare's decision here, it had distributed to its center directors a list of "helpful guidelines" for enrolling children with disabilities. Those guidelines included the center director's meeting with the child and family in the center before enrollment, observing the child in the classroom, assessing the staff person's ability to cope with the disability and the child's ability to adapt to the group, discussing the potential enrollment with a supervisor and with the staff, and enrolling the child for a "trial period." There was no evidence that KinderCare intended these to be anything more than what they purport to be: "helpful guidelines." Ms. Donahue did not invite Brandon for a meeting with KinderCare staff at the center, did not observe him in the classroom, and did not follow any of the other guidelines before making the decision concerning Brandon's enrollment.

KinderCare also has produced a reference booklet, KinderCare and the ADA, The Americans With Disabilities Act and the Enrollment Process. This booklet contains KinderCare's policy statement regarding care for children with disabilities. That statement indicates that KinderCare "reviews each child's situation on a case-by-case basis to determine if the child's needs can be met in the KinderCare setting." The booklet directs KinderCare employees to "[a]scertain if you have sufficient resources for the child and her unique needs ... while still having the caring responsibility for the other children in the group." The booklet indicates that enrollment for a trial period is "usually" a good idea, but that a KinderCare director should "not put off telling the family once [the director] know[s] the situation is not going to work."

Discussion

The Roberts brought this action on behalf of Brandon, alleging that KinderCare's acceptance of Brandon only when accompanied by a PCA violates the ADA and the MHRA. They argue that KinderCare did not make reasonable efforts to accommodate Brandon's needs, and that KinderCare's policies "dictate" that KinderCare must not make an admission decision regarding a disabled child "until the child has had at least two visits to the center." Essentially, they argue that because KinderCare did not follow its own policy regarding enrollment of disabled children, KinderCare failed to reasonably accommodate Brandon or otherwise discriminated against Brandon. The Roberts seek injunctive relief, as well as compensatory and punitive damages.

I. *Duty to Provide One-on-One Care*

KinderCare argues that it had no duty under the ADA or the MHRA to provide one-on-one care to Brandon because providing such care would alter the nature of KinderCare's business, and would place an undue financial burden on KinderCare. The Roberts argue that KinderCare is in the business of providing child care generally, and that providing one-on-one child care therefore would not affect its business function. The Roberts also argue that KinderCare would have no financial burden to provide additional staffing "on most days," because the absence of Brandon's PCA would have been "rare." Additionally, they argue that KinderCare has "numerous mechanisms in place to provide replacement staffing on a[n] emergency basis;" that KinderCare could have directed a substitute teacher or the center director to provide one-on-one care in the absence of Brandon's PCA.

A. *Fundamentally Altering the Service Provided*

The ADA prohibits an entity that provides a public accommodation from failing to take steps to ensure disabled persons are not denied service "unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the ... service ... or accommodation being offered."

This Court has no difficulty concluding that requiring KinderCare to provide one-on-one child care would fundamentally alter the nature of its service. The undisputed evidence at trial establishes that

there are at least two distinct types of child care service: group child care and individual child care. KinderCare is in the group child care business and does not seek to provide individual child care. It does not provide one-on-one child care on a regular basis to any child except as necessary to deal with temporary, urgent needs. Requiring KinderCare to provide one-on-one service essentially places it into a child care market it did not intend to enter.

The Court is unpersuaded by the Roberts' argument that because KinderCare is in the business of providing child care, requiring one-on-one child care would not fundamentally alter its service. The Roberts construe “service” too broadly.

B. *Undue Burden*

The ADA and MHRA also do not require an entity offering a public accommodation to endure an undue burden in order to provide its service to a disabled person. The Roberts point to KinderCare's $2.4 million 1994 first quarter net income for the proposition that provision of one-on-one service would not impose an undue financial burden on KinderCare.

To determine whether an action would result in an undue burden, the Court considers several factors: the nature and cost of the action; the financial resources of the site involved; the number of persons employed at the site; the effect on expenses and resources; the administrative and financial relationship of the site to the corporation; and, if applicable, the overall financial resources of the parent corporation and the number of its facilities. 28 C.F.R. §36.104. KinderCare argues it would have to hire a full-time care-giver to ensure one-on-one care for Brandon on those dates and times his PCA does not accompany him. The Roberts argue that a part-time employee would be sufficient.

The evidence revealed that PCA care is unpredictable, at best. Certainly, KinderCare would not be able to predict those dates Brandon's PCA would be ill or through some other circumstance unable to accompany Brandon. The Court agrees that to ensure the one-on-one care Brandon needed likely would have required KinderCare to employ a full-time care-giver. The evidence revealed that KinderCare would pay this employee approximately $200 per week, plus provide benefits. The evidence also revealed that KinderCare would have received $105 per week in tuition for Brandon's care.

The Roberts do not dispute that the Apple Valley KinderCare operates “on a shoestring budget,” and offered no evidence contrary to trial testimony indicating that the $95 per week loss for Brandon's care would constitute a substantial financial detriment to the site. Additionally, the evidence established that KinderCare has recently emerged from bankruptcy.

The Roberts argument that KinderCare could simply transfer the center's director or some other staff member to provide Brandon's one-on-one care without any cost is unpersuasive. Ms. Donahue testified that in those rare events that she, as center director, must serve as a replacement for an absent teacher for whom no substitute is available, her work as director simply piles up and she must work into the night to compensate. Because of the frequent one-on-one service KinderCare would be required to provide in lieu of Brandon's absent PCA, simply juggling staff is not a quick, cost-free fix to the problem. The facts produced at trial relevant to issues listed above, point to a finding that requiring KinderCare to provide one-on-one care to Brandon in the absence of his PCA would impose an undue financial or administrative burden on KinderCare; thus, the accommodation the Roberts sought was not a reasonable accommodation within the meaning of the ADA or the MHRA.

II. *Duty to Provide Day Care Services Without One-on-One Care*

The Plaintiff presented evidence at trial challenging Brandon's actual need for one-on-one care due to Brandon's improvement. However, it is undisputed that KinderCare was required at least to incorporate Brandon's existing IEP into the care it provided him, if not to follow the IEP directly. The evidence established that Brandon's mother, his treating psychologist and his existing IEP, all indicated that Brandon required one-on-one care for his own safety. KinderCare certainly had no duty

to ignore Brandon's safety needs, or to seek ways to circumvent those needs in order to gain his enrollment.

Notes

1. *Undue burden.* Programs are not expected to provide auxiliary aids and services that are fundamental alterations or unduly burdensome. 42 U.S.C. §12182(b)(2)(A)(iii). In instances where this is the case, the program must still provide alternative services to the maximum extent possible. Undue burden means something that would involve significant difficulty or expense. Factors that are to be considered include the nature and cost of the service, the overall financial resources of the program, legitimate safety concerns, parent/subsidiary relationship and the type of program.

There are a number of cases addressing a range of issues that provide guidance, although cases must be considered based on their individual facts. For example, in *Arizona v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666 (9th Cir. 2010), the court held that open captioning on movie screens is not required by ADA, citing DOJ commentary. Closed captioning and audio descriptions, however, are auxiliary aids and services that movie theaters may be required to provide. The court remanded for determination as to whether these services would fundamentally alter service or be an undue burden. In *Millay v. Maine*, 762 F.3d 152 (1st Cir. 2014), a student who was blind sought to be reimbursed for costs of commuting to a culinary arts program. The court held that this was required apparently because the program had accepted the student knowing of his needs. In *McDavid v. Arthur*, 437 F. Supp. 2d 425 (D. Md. 2006), the court found that it would be unduly burdensome to provide the necessary level of staff training to provide injections as an accommodation for a child's diabetes in afterschool and summer programs.

2. *Evolving technology to be considered.* Regulations as they appear in the Federal Register are often helpful because of the commentary included within them. With respect to auxiliary aids, the issue of communication is addressed. 56 Fed. Reg. 35565 to 35568 (July 26, 1991).

The commentary notes that for individuals with hearing, visual, or speech impairments, it is not required to use the most advanced technology if effective communication occurs without it. The ADA itself provides examples of accommodations, including interpreters, readers, taped texts, and visually delivered materials. 42 U.S.C. §12102(1). The guidance notes the following for consideration: note takers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, Brailled materials, and large print materials.

Cases involving communications services in a variety of settings include *Runnion v. Girl Scouts of Greater Chicago & Northwest Indiana*, 786 F.3d 510 (7th Cir. 2015), in which the issue was whether disbanding a Girl Scout troop was retaliation for an interpreter request.

On July 23, 2010, the Department of Justice issued ADA regulations, effective March 15, 2011. 75 Fed. Reg. 56,164 to 56,236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236 to 56,358 (September 15, 2010) (Title III). These include the obligation regarding effective communication. The new regulations provide that the obligation extends to companions of individuals with disabilities. The regulations address a range of issues including requirements for televisions at places of lodging and hospitals. Also addressed is the issue of captioning at movie theaters and other public settings.

3. *Other obligations under 2010 regulations.* Providing auxiliary services does not mean that a covered entity must provide personal devices such as wheelchairs, prescription glasses or hearing aids, or assistance in eating, toileting, or dressing; nor are public accommodations required to alter their inventory or change the type of goods or services that they normally provide in order to comply. 28 C.F.R. §§36.306, 35.195 and 36.307.

D. Architectural Barriers

[1] Covered Facilities

When most people think about individuals with disabilities, they think about those who use wheelchairs. The international symbol for handicap/disability access is a graphic design wheelchair. When considering physical access to the environment, many of the barriers do affect individuals who use wheelchairs or who have other mobility impairments. Lack of access, however, affects individuals with other kinds of disabilities, such as those related to hearing and visual impairments.

For example, a coat rack in a hallway that protrudes from the wall may be a barrier for a person who is blind. Audible fire warnings will be of no use to an individual who is deaf. And some access features may detrimentally affect individuals with one type of disability while benefitting others. For example, lowering elevator buttons for individuals using wheelchairs may adversely affect individuals who are not in wheelchairs, but who have limited range of motion.

In recognition of the various types of disabilities and the barriers that affect individuals with these disabilities, a number of federal, state, and local laws have been enacted to ensure that the environment is more accessible. This chapter focuses primarily on federal laws, but it is important to recognize that state and local laws may be more comprehensive in some cases. For example, religious entities and private clubs have certain exemptions under the major federal laws, but state and local requirements often apply to these facilities. The differences in enforcement are also important in comparing state and local requirements with federal law. For example, local law may work primarily by requiring accessibility as a requirement to obtain a building permit. This law may not include a mechanism for an individual to challenge noncompliance.

The three major federal laws requiring architectural access are the Architectural Barriers Act of 1968 (ABA), 42 U.S.C. §§4151–4157; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794; and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq. (ADA). For the most part, accessibility in housing is not covered in this chapter because it is separately treated in Chapter 8, which addresses housing. There has been little litigation under the ABA or the Rehabilitation Act, so most of the judicial interpretation of architectural barrier requirements arises under the ADA. There are some requirements that may arise under Sections 501 and 503 of the Rehabilitation Act, 29 U.S.C. §§791, 793, but generally the Rehabilitation Act requirements arise as a result of Section 504.

Which law applies depends primarily on whether the facility is public or private, whether it meets certain definitional requirements within the statute, and who is challenging the lack of access. For example, Title I of the ADA does not apply to employers with fewer than 15 employees, so a small employer, such as a “mom and pop” grocery store, would not be subject to the mandates to remove architectural barriers as a reasonable accommodation to an individual working there. That same employer, however, may be a public accommodation under Title III of the ADA, so that the public portions of the store would be subject to accessibility requirements for customers.

The Architectural Barriers Act (ABA) was the first major federal statute to affect building design. Passed in 1968, it applies to buildings and facilities built with federal funds or leased by the federal government. The four major federal agencies that have facilities subject to the ABA are the General Services Administration, the Department of Housing and Urban Development, the Department of Defense, and the United States Postal Service. Minimum accessibility guidelines were developed pursuant to the ABA. The enforcing agency for the ABA is the Architectural and Transportation Barriers Compliance Board, which was not created until 1973. The ABA mandates only apply to new construction or renovations and alterations. They do not require retrofitting. The ABA has no major impact on private entities that are considered to be public accommodations.

It is obvious that only a small percentage of all buildings and facilities are subject to the ABA. Section 504 of the Rehabilitation Act, passed in 1973, expands the zone of coverage to facilities

receiving federal financial assistance. Like the ABA, Section 504 does not require retrofitting, except to the extent that barrier removal or other accessibility changes might be required to make the facility accessible when viewed in its entirety. The Fair Housing Act Amendments of 1988, 42 U.S.C. §3601 et seq., expanded accessibility requirements to housing.

Even with these federal mandates, there are a great number of buildings and facilities subject to none of the major federal mandates. The passage of the Americans with Disabilities Act in 1990 is particularly significant because of its expanded coverage to most workplaces, most places of public accommodation, and most facilities and buildings operated by state and local governmental agencies. Title I of the ADA has accessibility requirements for the workplace, Title II for state and local governmental bodies, and Title III for private operators of public accommodation. The ADA mandates specific design standards for new construction under Titles II and III, requires some access when there are renovations or alterations, and requires barrier removal. The specific barrier removal requirements depend on whether the entity is an employer (where removal would be subject to reasonable accommodation standards), a state or local government agency (requiring barriers to be removed to the extent that the program is accessible when viewed in its entirety), or a place of public accommodation (requiring barrier removal to the extent it is readily achievable). There are also a number of barrier removal tax incentives and grant programs from agencies that are designed to provide carrots as well as sticks in making the environment accessible.

On July 23, 2010, the Department of Justice issued final regulations under the ADA on a number of matters, including some architectural barrier issues, effective March 15, 2011. 75 Fed. Reg. 56,164–236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236–358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28 C.F.R. Parts 35 and 36. The regulations address ticketing for accessible seating in sports and similar arenas, access requirements for residential housing provided by state and local governmental entities, and detention and correction facility access issues for new construction and alterations. The new regulations also provide new design standards for new construction and alterations for access in recreation areas (including amusement rides, boating facilities, exercise machines and equipment, fishing piers and platforms, golf facilities, miniature golf, play areas, swimming pools) and in public facilities (including detention and correctional facilities, judicial facilities, and residential dwelling areas).

These regulations allow entities that complied with the 1991 design standards to have a "safe harbor" for existing facilities. The safe harbor exemption is found in the regulations. 28 C.F.R. §§35.150(b)(2); 35.151(b)(4)(ii)(C); 36.304(d)(2).

As some of the cases in this chapter illustrate, it is possible for more than one statute to apply. It is also possible that more than one of the titles of the ADA may apply. Furthermore, more than one entity may be liable for noncompliance with the architectural access requirements. The *Fiedler* case raises a unique setting, because the facility at issue was leased to a private movie chain by a federal government agency.

Fiedler v. American Multi-Cinema, Inc.

871 F. Supp. 35 (D.D.C. 1994)

JACKSON, DISTRICT JUDGE.

Plaintiff Marc Fiedler is a quadriplegic movie-goer in Washington, D.C., who uses a wheelchair to ambulate. Defendant American Multi-Cinema, Inc. ("AMC") is a nationwide operator of movie theaters, one of which is the Avenue Grand, located on the basement concourse of Union Station, the principal passenger railway terminal in Washington, D.C. The only wheelchair seating available to Mr. Fiedler when he attends the Avenue Grand Theater is one of two wheelchair sites situated at the very back of the theater, in the last row of conventional seats farthest from the screen.

Union Station is owned by the United States and managed by the Department of Transportation,

("DOT"), an agency in the executive branch of the federal government. The Avenue Grand premises (and its sister theaters) are leased to AMC by DOT. Both the construction of the Avenue Grand Theater and the lease thereof to AMC antedate the enactment and the effective date of the Americans with Disabilities Act of 1990 ("ADA").

Plaintiff Fiedler brings this three-count complaint against AMC alleging, in the first count, that AMC's placement of wheelchair seating in the Avenue Grand Theater violates the ADA. By relegating him to inferior seating in the back of the theater when he goes to see a movie at the Avenue Grand, Fiedler alleges that AMC deprives him of full and equal enjoyment of the facilities to which he, as a disabled person, is entitled under the ADA. As the ADA authorizes a private victim of discrimination to do, he prays for an injunction directing AMC to so reconfigure the seating in the Avenue Grand as to enable him to occupy a wheelchair seat situated in the fourth or fifth rows of the theater.

In the second count of his complaint, Fiedler asks for similar injunctive relief under the District of Columbia Human Rights Act, D.C. Code §1-2501 et seq., with respect to the Avenue Grand's eight smaller sister theaters, each of which has a seating capacity below the ADA's threshold of 300 seats. In the third and final count of his complaint, Fiedler asks for an award of compensatory damages from AMC for the common law tort of failing to furnish facilities to a member of the public without discrimination.

AMC has moved for summary judgment on the entire complaint, on several grounds. AMC contends that the ADA is inapplicable to its Union Station premises by virtue of its status as a lessee of an entity itself not subject to the provisions of the ADA, namely, the executive branch of the federal government. Second, AMC argues that even if it must comply with the ADA generally, dispersed seating for wheelchair-bound patrons [Authors' Note: This term is generally not considered to be appropriate. The preferred term would be wheelchair user.] is not required at the Avenue Grand because the theater actually conforms to a technical exception the United States Department of Justice has written into its implementing literature for the ADA, allowing the "clustering" of seating for the disabled in certain circumstances. Lastly, AMC asserts that the ADA does not require equivalent treatment of the disabled and the able-bodied when to do so would present a "direct threat" to the health or safety of others.

I.

AMC contends that Title III of the ADA is inapplicable to it because it leases the space for its theaters from an agency in the executive branch of the federal government. The parties agree that the executive branch is exempt from the requirements of Title III of the ADA, and that insofar as government buildings are concerned, executive branch real estate is subject to another federal anti-discrimination regime, namely, the Architectural Barriers Act ("ABA") of 1968.[5] AMC argues that since Union Station is a federal building, it is covered only by the ABA, and AMC, as lessee of a federal landlord, can therefore claim the benefit of Union Station's ADA-exempt status for the purpose of avoiding the requirements of the ADA.

By its terms, however, Title III of the ADA applies to a "place of public accommodation," which in turn is defined as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories ... (3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment." The Avenue Grand Theater is indisputably a "motion picture house." It is "operated by a private entity," the defendant AMC. And by regulation it has been declared to "affect commerce."[6] Thus, the Court concludes that the Avenue Grand Theater is a "place of public accommodation" and, as such, is subject to Title III of the ADA.

Moreover, the ADA itself expressly contemplates that entities to which it applies might be subject to two or more separate sets of obligations with respect to their treatment of handicapped patrons. See

42 U.S.C. §12201(b) ("Nothing in this chapter shall be construed to invalidate or limit the remedies, rights and procedures of any Federal law ... that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter."). AMC maintains that the provisions of the ABA and the ADA may potentially conflict with one another, but it has made no showing here that its compliance with the ADA in this case would be inconsistent with any obligation it may also have inherited under the ABA as the lessee of a federal landlord. Accordingly, the Court finds that the ADA is applicable to AMC notwithstanding the federal government's fee simple ownership of the leased property.

II.

Having determined that the ADA is applicable, the Court must next consider whether AMC has complied with its requirements for retrofitting existing structures to accommodate the disabled. The requirements are found in the regulations promulgated by the Department of Justice, which, as they pertain to this case, provide as follows:

To the extent that it is readily achievable, a public accommodation in assembly areas shall—

(i) Provide a reasonable number of wheelchair seating spaces and seats with removable aisle-side arm rests; and

(ii) Locate the wheelchair seating spaces so that they—

(A) Are dispersed throughout the seating area;

(B) Provide lines of sight and choice of admission prices comparable to those for members of the general public;

(C) Adjoin an accessible route that also serves as a means of egress in case of emergency; and

(D) Permit individuals who use wheelchairs to sit with family members or other companions.

AMC acknowledges that dispersion of wheelchair seating throughout the Avenue Grand is "readily achievable." It is exempted from any obligation to do so, however, it says, by an "exception" found in an explanatory portion of the technical regulations allowing it to "cluster" wheelchair seating at a single location (presumably of its choice) in "bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent." The defendant argues that the underlined portion of Section 4.33.3 should be interpreted to mean that if the "slope," or grade, of the aisle in a theater or other place of public exhibition exceeds five percent, then it is not required to disperse wheelchair seating throughout the theater. Specifically, when the grade of the floor exceeds a one-inch rise in twenty inches of horizontal travel—an arguably more difficult ascent for a person in a wheelchair—as is the grade on all of the aisle areas of the Avenue Grand except at the rear, then the theater operator is entitled to "cluster" its wheelchair seating, ostensibly where it concludes it is safest for its wheelchair patrons, but in practical effect wherever it chooses.

Fiedler and the government maintain that the "exception" has nothing to do with the slope of floors or aisles; the exception speaks to the angle of vision between spectator and spectacle, or, more precisely, the angular distance a spectator must drop or raise his line of sight below or above the horizontal to observe what he came to see.

The mandatory portion of the regulation to which the "exception" relates, provides: Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. In context, therefore, both the mandate and the exception appear to concern, as Fiedler contends, a criterion of visual vantage, not physical safety. In other words, disabled people are to have equal access to the less desirable (and presumably cheaper) seats at theatrical events, as well as the most coveted.

The government, agreeing with Fiedler's interpretation of Section 4.33.3, asserts that the clustering exception is intended to have very limited application to discrete parts of assembly areas, such as balconies, bleachers, and the like. These seating areas are unique, it says, in that they are almost always situated high above the spectacle to be observed (i.e., where the sight lines almost always exceed five percent). To the extent safety is implicated at all in the reason for the exception, it is because access to these seats is almost always afforded by steps, not ramps. Thus, wheelchair seating can only be provided at the top or bottom of those areas. This narrow exception is inapplicable, according to the government, to a typical single-level movie theater, where steep lines of sight are not generally found.

As the author of the regulation, the Department of Justice is also the principal arbiter as to its meaning. The Court concludes that the exception to ADAAG Section 4.33.3 affords AMC no warrant to consign its wheelchair patrons to the back of the Avenue Grand Theater.

III.

AMC's most persuasive argument in support of a right to retain its wheelchair seating in the back of the Avenue Grand despite the ADA is that the presence of a wheelchair and its occupant in the midst of able-bodied patrons in fear for their own safety could impede a mass exodus of the theater in the case of an emergency. It would thus constitute a "direct threat to the health or safety of others," in which case compliance with the ADA is no longer obligatory. A "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." "In determining whether an individual poses a direct threat to the health or safety of others," thus justifying disparate treatment of the disabled in the interest of public health or safety, "a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk."

Fiedler cites to several cases recently decided under the ADA that have held that the right to treat a disabled person disparately, and less favorably, on the ground that to do otherwise would endanger others must be preceded by an individualized assessment of the nature and extent of danger in relation to the specific disability of the person to be disfavored.

Making his own individualized assessment in his case, Fiedler dismisses the threat to safety he poses as de minimis. He has, he says, ample upper body strength to move his own wheelchair rapidly up the aisles at the Avenue Grand. He also never attends a performance in a theater with a steeply sloped aisle unless he is accompanied by a companion who is willing and able to assist him in the event of an emergency. Moreover, he states, he customarily waits for the other patrons to exit before he leaves a movie theater. He observes that the likelihood of a theater fire is so remote—none having occurred in the United States, he says, in more than fifty years—and of a magnitude sufficient to force a general evacuation of the audience, given modern fire safety precautions, is such as to render the risk to others virtually non-existent.

AMC is not so sanguine. By scattering wheelchair seating throughout the audience, unless all of a theater's emergency exits are equipped with ramps (as those at the Avenue Grand are not), a wheelchair-bound patron can exit only at the rear, which he can reach only by negotiating his way up the aisle from a seat toward the screen. In event of an emergency evacuation, he would be proceeding against substantial crowd traffic heading for nearer exits in the opposite direction. Even those patrons moving in the same direction but behind the wheelchair will be able to proceed only at a pace determined by the ability of the occupant of the wheelchair to propel his or her chair upgrade.

A theater fire, moreover, while representing the classic crisis situation, is not the only event that could precipitate the flight of the audience: a bomb threat, a deranged patron with a gun, or a riot

could have a similar effect.

Finally, the cases cited by plaintiff are only marginally apposite. Fiedler's prayer for relief is not concerned with AMC's policies, practices, or procedures, but with its structural amenities. Thus, unlike policies, practices, and procedures—which are more readily adaptable and can be discretely applied in individual cases—structural changes, such as wheelchair seating dispersed throughout a movie theater, once built, would be available not only to Fiedler, but also to other handicapped individuals who may pose a far greater "direct threat" to other patrons than Fiedler.

Therefore, the "individualized assessment" called for in this case will require the taking of evidence to determine not only whether Mr. Fiedler's presence in the fourth or fifth row of the Avenue Grand Theater in his wheelchair poses a significant risk to his fellow theater-goers, but also whether others similarly limited by disability, but less agile or prudent than he, might also do so, and whether AMC can readily achieve an accommodation that might ameliorate the dangers so posed.

Notes

1. There have been a number of cases involving movie theaters and sports venues since this decision. Some of the issues raised in these cases are discussed in later sections of this chapter. Effective March 15, 2011, both the Title II and Title III regulations ensure ticketing for accessible seating in stadiums and arenas were updated. 28 C.F.R. §35.138 and §36.302(f). The revised regulations also clarify requirements for new construction of stadium style theater spaces. They also include requirements for other assembly areas, such as theaters and classrooms, seating and dispersal of seats. 28 C.F.R. §35.151(g). See also LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §6:13 (2012 and cumulative supplement) (citing cases on these and other issues).

2. Hotels and casinos are also covered entities. In *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177 (D. Nev. 1999), a hotel/casino was ordered to provide additional counter space in all bar areas in order to provide wheelchair users with bar access in each bar in the casino. The court found that wheelchair users should be able to use every bar in the casino, as each had its own theme and ambiance. Does that mean that every patron should be able to reach every section of the room?

[2] Accessibility Requirements

Programs subject to Section 504 of the Rehabilitation Act must meet its requirements. 34 C.F.R. §§104.21–.23. These requirements apply to both private and public entities receiving federal financial assistance. Private entities such as colleges and hospitals are covered by these requirements.

All programs subject to Section 504 are to be readily accessible when viewed in their entirety. 34 C.F.R. §104.22(a). Programs were to have conducted a self evaluation and developed a transition plan for removing barriers necessary to carry out this requirement. 34 C.F.R. §104.22(e). Thus, Section 504 does not require retrofitting of existing facilities to meet the same degree of accessibility that would be required for new construction and substantial alterations. Construction and alterations made after June 3, 1977, were to have met specified accessibility standards.

The ADA has very detailed and specific guidelines for new construction contained in the Americans with Disabilities Act Accessibility Guidelines (ADAAG). Existing facilities in programs subject to Title III of the ADA are subject to the requirement that barriers should be removed to the extent it is readily achievable to do so. This was to have been done by January 26, 1992. 28 C.F.R. §36.304. "Readily achievable" means easily accomplishable without much difficulty or expense. 28 C.F.R. §36.304.

For Title III covered programs, new construction and alterations made after January 26, 1993, are to meet ADA Accessibility Guidelines for Buildings and Facilities. 28 C.F.R. pt. 36, app. A. One of the major issues that can arise under the ADA is whether a change rises to the level of an alteration

subject to these requirements. Minor changes such as a new coat of paint would not trigger the requirements. Major alterations must affect a primary function area for the requirements to apply. Therefore, repairing a roof would probably not require accessibility compliance. Even where an alteration is significant enough to trigger access requirements, programs are not required to make changes that would be unduly expensive.

Revised regulations that include new provisions about architectural barriers are found at 75 Fed. Reg. 56,164 to 56,236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236 to 56,358 (September 15, 2010) (Title III).

[a] Alterations

Sidewalks are an architectural feature that for most locations were in place before the effective date of the ADA. The ADA requires retrofitting only where removal is needed to make the program accessible when viewed in its entirety (Title II) or if it is readily achievable (Title III). For many municipalities, retrofitting all of the sidewalks and making curbcuts at every corner is not financially feasible. Self evaluations done in many places have prioritized such removals. The ADA, however, does expect corrections when there are alterations. The following decision involves a local governmental facility that would be covered by Title II instead of Title III, but it raises the same issue, which is when a change is considered an alteration.

Kinney v. Yerusalim

9 F.3d 1067 (3d Cir. 1993)

ROTH, CIRCUIT JUDGE:

This appeal requires us to determine whether 28 C.F.R. §35.151(e)(1) (1992), issued by the Attorney General pursuant to Section 204 of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §12134 requires the City of Philadelphia (the "City") to install curb ramps[7] at intersections when it resurfaces city streets. At issue is whether resurfacing constitutes an "alteration" within the scope of the regulation.

I.

Plaintiffs are Disabled in Action, a non-profit organization, and twelve individuals with ambulatory disabilities who live and work in Philadelphia. In their complaint, plaintiffs sought injunctive relief for alleged violations of the ADA. These allegations were based on the City's practice of installing curb cuts only when work on the city streets otherwise affected the curb or sidewalk or when a complete reconstruction of the street was required.

The lack of curb cuts is a primary obstacle to the smooth integration of those with disabilities into the commerce of daily life. Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors. At present, people using wheelchairs must often make the Hobson's choice between travelling in the streets—with cars and buses and trucks and bicycles—and travelling over uncut curbs which, even when possible, may result in the wheelchair becoming stuck or overturning, with injury to both passenger and chair.

The City of Philadelphia has some 2,400 miles of streets, roads and highways. These streets typically consist of three components: a sub-base of stone, covered by a concrete base, finished with a layer of asphalt. For routine maintenance—patching, pothole repairs, and limited resurfacing—the City maintains a crew of roughly 300 people. For more extensive work, including most resurfacing, bids are solicited from outside contractors.

Resurfacing of the streets is done in a variety of ways, affecting different parts of the street structure. Resurfacing at its simplest is "paving," which consists of placing a new layer of asphalt

over the old. In other instances, a more complicated process of "milling" is used to ensure proper drainage or contouring of the road. Milling requires the use of heavy machinery to remove the upper 2 to 3 1/2 inches of asphalt. During an ordinary milling and resurfacing job, cracks in the concrete base may be discovered, and, if so, repaired. The most extensive form of resurfacing is "reconstruction," which involves removal and replacement of both the asphalt and the concrete or stone layers.

Whatever the extent of work performed under a contract, the City has certain minimum requirements for resurfacing. Thus, by the City's own specifications, resurfacing requires laying at least 1 1/2 inches of new asphalt, sealing open joints and cracks, and patching depressions of more than one inch. At issue in this appeal are those resurfacings which cover, at a minimum, an entire street from intersection to intersection. Thus, we are not called upon to decide whether minor repairs or maintenance trigger the obligations of accessibility for alterations under the ADA.

At present the City does not include the installation of curb cuts in its milling and resurfacing contracts unless the curb is independently intended to be altered by the scope of the contract. Thus, only those contracts calling for alterations to curbs include curb cuts; contracts for alterations limited to the street surface itself do not.

III.

Title II of the ADA prohibits discrimination in the provision of public services. Section 202 of the Act, 42 U.S.C. §12132 provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Congress' concern with physical barriers is apparent in both the history and the text of the legislation. For example, the findings section of the Act recounts:

> ....
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities ...;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as ... transportation ... and access to public services;
>
> ....
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including ... the discriminatory effects of architectural, transportation and communication barriers....

42 U.S.C. §12101. These general concerns led to a particular emphasis on the installation of curb cuts. The House Report for the legislation noted that "[t]he employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." As such, "under this title, local and state governments are required to provide curb cuts on public streets."

The Act itself does not set forth implementing standards, but rather directs the Attorney General to do so. 42 U.S.C. §12134(a). As guidance, Congress directed that the regulations be consistent both with the ADA and with the coordination regulations issued by the Department of Health, Education, and Welfare under Section 504 of the Rehabilitation Act of 1973, concerning nondiscrimination by recipients of federal financial assistance. With regard to program accessibility in existing facilities and communications, Congress directed that the regulations be consistent with the Department of Justice's Section 504 regulations for federally conducted activities.

Following this mandate, the Department of Justice issued regulations maintaining the previously established distinction between existing facilities, which are covered by 28 C.F.R. §35.150, and new construction and alterations, which are covered by 28 C.F.R. §35.151. With limited exceptions, the regulations do not require public entities to retrofit existing facilities immediately and completely. Rather, a flexible concept of accessibility is employed, and entities are generally excused from

making fundamental alterations to existing programs and bearing undue financial burdens. In contrast, the regulations concerning new construction and alterations are substantially more stringent. When a public entity independently decides to alter a facility, it "shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." This obligation of accessibility for alterations does not allow for non-compliance based upon undue burden.

Consistent with the emphasis on architectural barriers, the installation of curb cuts is specifically given priority in both the "existing facilities" and the "new constructions and alterations" sections of the regulations. Streets are considered existing facilities under the regulations,[8] and, as such, they are subject to the more lenient provisions of §35.150. However, because of the importance attributed to curb cuts, the regulations direct public entities to fashion a transition plan for existing facilities, containing a "schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act."

The existence of a transition plan for the installation of curb cuts on existing streets does not, however, negate the City's obligations under §35.151, governing alterations. In addition to the general provision in subpart (b), §35.151 has a second subpart addressed solely to the installation of curb ramps. This subpart provides that when a public entity undertakes to construct new streets or to alter existing ones, it shall take that opportunity to install curb ramps.

Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway. The City does not dispute the literal requirement that the regulation mandates the installation of curb cuts when the City "alters" a street. The City does, however, protest the notion that the resurfacing of a street constitutes an "alteration."

Subpart (e) does not explicitly define "alteration," either in general or as applied in particular instances. Our focus here is the specific application of the general provision in subpart (b) (alterations to existing facilities) to one subject in subpart (e) (streets). We will look first to subpart (b) for guidance:

> Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

In addition, subpart (c) provides that alterations made in conformity with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (the "ADAAG") or with the Uniform Federal Accessibility Standards (the "UFAS") shall be deemed to comply with the requirements of this section. Both guidelines provide technical and engineering specifications. The ADAAG definition of "alteration" is substantially the same as that in the regulation: "a change to a building or facility ... that affects or could affect the usability of the building or facility or part thereof." It continues: "[n]ormal maintenance ... [is] not [an] alteration unless [it] affect[s] the usability of the building or facility."

These provisions lead one to the conclusion that an "alteration" within the meaning of the regulations is a change that affects the usability of the facility involved. If we then read the "affects usability" definition into subpart (e), the regulation serves the substantive purpose of requiring equal treatment: if an alteration renders a street more "usable" to those presently using it, such increased utility must also be made fully accessible to the disabled through the installation of curb ramps.

Subpart (e) effectively unifies a street and its curbs for treatment as interdependent facilities. If a street is to be altered to make it more usable for the general public, it must also be made more usable for those with ambulatory disabilities. At the time that the City determines that funds will be

expended to alter the street, the City is also required to modify the curbs so that they are no longer a barrier to the usability of the streets by the disabled. This interpretation helps to implement the legislative vision, for Congress felt that it was discriminatory to the disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded.

Although there is limited analysis of the "alterations" sections of Title II, the discussion of the parallel provision in Title III (addressing public accommodations) is helpful in our analysis here.[9] In the context of Title III, Congress' discussion of "affecting usability" focused on the "primary function" of a facility. "Areas containing primary functions refer to those portions of a place of public accommodations where significant goods, services, facilities, privileges, advantages or accommodations are provided."

Thus, while Congress chose not to mandate full accessibility to existing facilities, it required that subsequent changes to a facility be undertaken in a non-discriminatory manner. The use of such changes must be made available to all. The emphasis on equal treatment is furthered, as well, by an expansive, remedial construction of the term "usability." "Usability should be broadly defined to include renovations which affect the use of a facility, and not simply changes which relate directly to access."

With this directive, we must now determine whether resurfacing a street affects its usability. Both physically and functionally, a street consists of its surface; from a utilitarian perspective, a street is a two-dimensional, one-plane facility. As intended, a street facilitates smooth, safe, and efficient travel of vehicles and pedestrians—in the language above, this is its "primary function."

As such, we can only agree with the district court that resurfacing a street affects it in ways integral to its purpose. As discussed above, "resurfacing" involves more than minor repairs or maintenance. At a minimum, it requires the laying of a new asphalt bed spanning the length and width of a city block. The work is substantial, with substantial effect. As the district court described in its opinion ... :

> Resurfacing makes driving on and crossing streets easier and safer. It also helps to prevent damage to vehicles and injury to people, and generally promotes commerce and travel. The surface of a street is the part of the street that is "used" by both pedestrians and vehicular traffic. When that surface is improved, the street becomes more usable in a fundamental way.

Finally, we must consider the City's suggestion that interpretation of the ADA is always subject to a requirement of reasonableness. It is true that reasonableness language appears in the text of §35.151(b): "Each facility or part of a facility altered ... shall, *to the maximum extent feasible*, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities" (emphasis added). The City relies on a prior decision of this court, [citation omitted], interpreting a Department of Transportation regulation that is similar to 28 C.F.R. §35.151(b).[10] There we stated that the relevant questions were "to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons" and "what degree of accessibility ... becomes 'feasible' within the scope of alterations." Because the ... regulation referred to "accessibility" rather than "usability," with resulting limits on scope and effect, the district court found the case to be inapposite. We need not decide that issue. Were we considering alterations only covered by §35.151(b), the relevance of [that decision] would be at issue. However, in this case the Attorney General has already determined, in promulgating §35.151(e), that the installation of curb cuts is feasible during the course of alterations to a street. Subpart (e) is a specific application of the general principle contained in subpart (b).

IV.

As a final argument, the City contends that, even if resurfacing is an "alteration" requiring the installation of curb cuts, it is entitled to assert an "undue burden" defense excusing compliance. There is no general undue burden defense in the ADA. Rather, following the Section 504 regulations for

program access in existing facilities, as Congress intended, the ADA regulations provide for the defense only in limited circumstances. For example, §35.150(a)(3), governing "existing facilities," excuses a public entity from taking "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."

As discussed above, there are logical reasons for the distinction between existing and new or altered facilities. Allowance of an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs. New construction and alterations, however, present an immediate opportunity to provide full accessibility. Congress recognized the competing social interests at stake: "While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole." Balancing these interests, Congress acknowledged the existence of an undue burden defense for existing facilities but clearly warned, "[n]o other limitation should be implied in other areas."

The City acknowledges that the defense is not available for alterations. Nonetheless, it makes a last-ditch attempt at characterizing a street and its curbs as separate facilities. As such, a curb would remain an existing facility susceptible to the "undue burden" defense even while the street that it abuts is being altered. As with our discussion ... above, the express language of §35.151(e) refutes this reasoning. That section requires the installation of curb ramps if a street is altered. When the City decides that funds are available for the alteration of the street, the City must now understand that such a determination is to be made with the awareness that subpart (e) also requires alteration of the curbs. Thus, once the City undertakes to resurface a street, the accompanying curbs are no longer to be considered as existing facilities, subject to the "undue burden" defense of §35.150(a)(3). They are now, pursuant to the language of subpart (e), incorporated with a facility under alteration, pursuant to §35.151, so that the "undue burden" defense is no longer available.

V.

For the foregoing reasons, we find that resurfacing of the city streets is an alteration within the meaning of 28 C.F.R. §35.151(b) which must be accompanied by the installation of curb cuts under 28 C.F.R. §35.151(e). We will affirm the decision of the district court.

Note

1. The chapter on governmental services (Chapter 5) includes an excerpt from the Supreme Court decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). The excerpt focuses on whether prisons are covered under Title II of the ADA. A later section includes an excerpt in the Supreme Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), focusing on whether state and local governmental agencies are immune from damage actions under Title II in cases involving access to the judicial system. These decisions together mean that such programs are covered and that they are subject to damages as a remedy. What they do not decide is what is specifically required in terms of architectural access for jails, prisons, courthouses, police stations, and other criminal justice facilities. These are challenging issues, because most of them are existing facilities and their use for criminal justice includes challenging issues of safety and security. In the case of courthouses, many are historical structures built decades ago, and exist in areas where economic challenges make it difficult to engage in expensive retrofitting. For cases on these issues, see §9:11 (4th cumulative edition) (citing cases on these and other issues).

2. There have been a number of cases addressing the issue of whether sidewalks, curbs and parking lots are services under Title II of the ADA. The Fifth Circuit, sitting en banc, concluded that building or altering public sidewalks is a service covered by Title II and that sidewalks themselves are services, programs or activities covered by the statute. See *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir.

2011) (en banc). See also *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002) (holding that public sidewalks and curbs are services, programs or activities under Title II). See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §6:15 (2012 and cumulative supplement) (citing cases).

[b] Existing Facilities

The next decision involves a facility that is subject to Title III of the ADA and demonstrates the concerns about what is required of existing facilities. It provides a broad overview of the various defenses that might be raised. It may be the only major decision that addresses the constitutionality of the ADA. Perhaps this early decision sent a signal to other potential plaintiffs that constitutional challenge was not a viable theory as a defense.

Pinnock v. International House of Pancakes

844 F. Supp. 574 (S.D. Cal. 1993)

RHOADES, DISTRICT JUDGE:

I. *Background*

Plaintiff, Theodore A. Pinnock ("Pinnock") filed the complaint in this action against Defendant, Majid Zahedi, owner of an International House of Pancakes franchise ("Zahedi"). Pinnock, an attorney representing himself, is unable to walk and uses a wheelchair. Pinnock dined at the defendant's restaurant on June 21, 1992, and then attempted to use the restroom. The entrance to the restroom, however, was not wide enough to admit his wheelchair. Pinnock therefore removed himself from his wheelchair and crawled into the restroom. As a result of this encounter, Pinnock alleges nine causes of action against Zahedi. Five of the causes of action arise under state law, alleging violations of the state health and safety code, the Unruh Civil Rights Act, and infliction of emotional distress. The remaining four causes of action are alleged under the Americans with Disabilities Act of 1990 ("ADA"), arising from Zahedi's alleged failure to comply with the statute's provisions governing access for disabled individuals in public accommodations ("title III").

Zahedi argues that Congress does not have constitutional authority to regulate his facility, asserting that title III of the ADA exceeds the powers granted Congress by the U.S. Constitution. Congress enacted title III pursuant to Article I, Section 8, of the United States Constitution, which grants Congress the power to "regulate Commerce ... among the several States" and to enact all laws necessary and proper to this end. The Supreme Court has consistently held that Congress is empowered under the Commerce Clause to regulate not only interstate activities, but also intrastate activities that substantially affect interstate commerce. The Commerce Clause allows Congress to regulate any entity, regardless of its individual impact on interstate commerce, so long as the entity engages in a class of activities that affects interstate commerce.

Courts must defer to congressional findings that an activity affects commerce, so long as there is a rational basis for such a finding. As the Supreme Court recognized in the context of racial discrimination, the restaurant industry unquestionably affects interstate commerce in a substantial way.

Even aside from its membership in an interstate industry, Zahedi's restaurant demonstrates characteristics which place it squarely in the category of interstate commerce. It is a franchise of a large, international, publicly traded corporation ("IHOP Corp."), organized under Delaware law. IHOP Corp. had total retail sales of $479 million in 1992, operates 547 franchises in thirty-five states, Canada, and Japan, and employs 16,000 persons. Furthermore, Zahedi's restaurant is located directly across the street from State Highway 163, and within two miles of two interstate highways. There are three hotels within walking distance, and three motels within one and one-half miles of the restaurant. The courts have found these facts to be indicia of a business operating in interstate commerce.

Congressional enactment of title III of the ADA was well within Congress' power to regulate

interstate commerce under the Commerce Clause. As part of the restaurant industry, Zahedi is subject to the provisions of title III, which by its own terms, reaches as broadly as the Commerce Clause permits. As a member of the restaurant industry and as an individual enterprise which caters to travelers, Zahedi's restaurant is properly regulated by title III of the ADA.

III. *Title III of the ADA is Not Unconstitutionally Vague*

Zahedi argues that many of the terms used in section 12182(b)(2) of title III are unconstitutionally vague and are therefore in violation of the Due Process Clause of the Fifth Amendment. Statutes which fail to adequately specify the actions or conduct necessary to conform with the law pose problems for which the Supreme Court has expressed serious concern. However, the terms with which Zahedi takes issue do not deprive private businesses of the ability to steer between lawful and unlawful conduct. To the contrary, the statute, its preamble, the legislative history, and the accompanying guidelines provide more than ample explanation of the statute's application.

A. *Statutes Regulating Commercial Activity are Subject to Lower Standards of Specificity*

Vagueness challenges are considered under varying standards, depending upon the nature of the statute. Statutes which threaten to inhibit freedom of speech or other constitutionally protected rights face a more stringent vagueness test. Criminal statutes, in general, face a higher vagueness standard than do civil statutes: “The Court has ... expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982).

By contrast, purely economic regulations are subject to lower standards of specificity.... Title III of the ADA is a civil statute regulating commercial conduct. As such, Zahedi can successfully sustain its challenge only if he can prove that the enactment specifies “no standard of conduct ... at all.”

B. *Limiting Constructions Offered by the Department of Justice are Properly Considered*

In evaluating a vagueness challenge, a court should consider the words of the ordinance, interpretations given to analogous statutes, and “the interpretation of the statute given by those charged with enforcing it.”

Zahedi argues that the limiting constructions offered by the Department of Justice should not be considered when examining the statute for vagueness because none of the cases cited by the Government involve federal statutes. [W]hen federal and state statutes are challenged on the same constitutional grounds, they should be held to the same standard. The reasons for applying limiting constructions to state statutes apply with equal force to federal statutes. Therefore, the limiting constructions offered by the Department of Justice and the title III Technical Assistance Manual, which are available to the public, are properly considered.

C. *Each of the Challenged Terms, When Considered in Conjunction With Limiting Constructions, is Sufficiently Precise*

[T]he terms of title III are marked by well-reasoned flexibility and breadth. When considered in conjunction with the Department of Justice guidelines, these terms are not unconstitutionally vague.

1. *Readily Achievable Barrier Removal*

Title III requires existing places of public accommodation to remove architectural barriers to access, where such removal is “readily achievable.” 42 U.S.C. §12182(b)(2)(A)(iv). The term is defined in the statute as “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. §12181(9). The statute enumerates four factors to consider when determining whether a modification is readily achievable, and the legislative history lists examples of the types of changes Congress believes are readily achievable. These include specific examples for small stores and restaurants such as rearranging tables and chairs and installing small ramps and grab bars in restrooms.

In addition, the federal regulation further elucidates the term "readily achievable" by adding other factors. These include the overall financial resources of the parent corporation and safety requirements. 28 C.F.R. §36.104, at 460–61. The regulation lists 21 examples of barrier removal likely to be "readily achievable" in many circumstances, such as installing ramps and repositioning shelves and telephones.

Finally, the preamble to the regulation provides further explanation and notes that use of a more specific standard would contravene the goals of the ADA:

> the Department has declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodation requirements and the economic situation that any particular entity would find itself in at any moment.

The specifications easily met the requirements for economic regulation announced in *Hoffman Estates*.

2. *Alternatives to Barrier Removal*

Title III provides that where barrier removal is not readily achievable, a covered entity must make its goods or services available through "alternative methods if such methods are readily achievable." 42 U.S.C. §12182(b)(2)(A)(v). The legislative history, the regulation itself, and the preamble all provide specific examples of appropriate alternatives to barrier removal. These include providing curb service or home delivery, coming to the door of the facility to handle transactions, serving beverages at a table for persons with disabilities where a bar is inaccessible, providing assistance to retrieve items from inaccessible shelves, and relocating services and activities to accessible locations. These provisions also meet the specificity requirements for economic regulations.

3. *Reasonable Modifications of Policies and Procedures*

The statute requires public accommodations to: make reasonable modifications in policies, practices or procedures, when such modifications are necessary to afford such goods, services ... to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations; 42 U.S.C. §12182(b)(2)(A)(ii). Zahedi argues that the phrases "reasonable modifications" and "fundamentally alter" are unconstitutionally vague.

Illustrations of the term "reasonable modifications" are provided in the title III regulation and its preamble. For example, stores in which all of the checkout aisles are not accessible are required to ensure that an adequate number of accessible checkout aisles are left open at all times. Likewise, facilities that do not permit entry to animals would be required to modify such policies as they apply to service animals accompanying disabled individuals.

The preamble to the title III regulation contains a lengthy explanation of the concept of fundamental alteration, and explains that the "rule does not require modifications to the legitimate areas of specialization of service providers." The preamble also provides an example of an acceptable referral to another provider who specializes in a requested service.

Furthermore, as the Government points out, the term "fundamentally alter" has been previously used in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). That decision construed section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally assisted or operated programs or activities. In *Davis*, the Court concluded that programs did not discriminate if they failed to make accommodations that would "fundamentally alter" the nature of the program. The terms "reasonable modifications" and "fundamental alteration" are therefore not unconstitutionally vague.

4. *Most Integrated Setting Appropriate*

Title III requires covered entities to afford their goods and services to an individual with a disability "in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. §12182(b)(1)(B). The preamble to the title III regulation provides two pages of examples and explanations illustrating the meaning of this provision. One example provides that it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability to full use of a health spa because of stereotypes about the person's ability to participate. The legislative history provides further illustration, noting that the "integrated settings" provision is intended to prevent segregation based on fears and stereotypes about persons with disabilities. The term "most integrated setting appropriate," as used in title III, is not unconstitutionally vague.

5. *Undue Burden*

Under title III, public accommodations are required to provide auxiliary aids in order to extend their services to persons with disabilities, unless to do so would pose an "undue burden" to the covered entity or would "fundamentally alter" the nature of its goods or services. 42 U.S.C. §12182(b)(2)(A)(iii). The term "undue burden" is defined in the regulation as a "significant difficulty or expense." The regulation lists factors for determining whether a particular action will create an undue burden. These are the same factors as those provided for assessing whether an action is "readily achievable." The preamble, however, clarifies that: "[R]eadily achievable" is a lower standard than "undue burden" in that it requires a lower level of effort on the part of the public accommodation.... [A] public accommodation is not required to provide any particular aid or service that would result in either a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or in an undue burden. Both of these statutory limitations are derived from case law under section 504 [of the Rehabilitation Act of 1973] and are to be applied on a case-by-case basis.... Furthermore, the regulation is supplemented by discussion in the Technical Assistance Manual, which provides explanations of both "undue burden" and "fundamental alteration."

6. *Full and Equal Enjoyment and Opportunity to Participate*

Title III's general prohibition against discrimination provides as follows: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation...." 42 U.S.C. §12182(a). Zahedi claims that the phrase "full and equal enjoyment" is impermissibly vague. However, the next subsection of the statute, entitled "Construction" enumerates categories of actions that constitute such discrimination. These categories include denying a person with a disability public accommodations, or providing accommodations not equal to that afforded to other individuals.

Furthermore, the legislative history explains that [f]ull and equal enjoyment does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result. Thus, the terms "full and equal enjoyment" are given ample operational definition, as are the specific subsections of this provision that Zahedi challenges. As the government argues, the prohibition denying individuals with disabilities an "opportunity to participate in or benefit from" the goods or services of a covered entity clearly means that persons with disabilities may not be excluded from receiving the services of a place of public accommodation.

IV. *Title III is Not Retroactive Legislation*

Zahedi challenges the ADA on the grounds that it is retroactive legislation and therefore violates the Due Process Clause of the Fifth Amendment.

The fact that title III applies to existing places of public accommodation does not render the statute retroactive. Congress routinely acts to regulate existing businesses, programs, and structures,

imposing new guidelines which reflect the changing social and environmental standards of our democratic system. The fact that such legislation affects existing entities does not insulate responsible parties from compliance with the law.

The relevant inquiry is whether the legislation imposes liability or penalty for conduct occurring prior to the effective date of the statute. "The determination of whether a statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date." The ADA provided an 18 month notice period in which businesses could comply with the Act's requirements, and no liability was imposed prior to the end of that period. Small businesses were given an even lengthier notice period. Pinnock's complaint was not filed until September 9, 1992, nearly two years after the ADA was passed on July 26, 1990. The requirements of the title III do not subject Zahedi to retroactive legislation.

V. *Promulgation by the Attorney General's Office of Regulations Implementing the Provisions of Title III of the ADA Is Not an Unconstitutional Delegation of Authority by Congress*

[Omitted.]

VI. *Requiring Alterations to Property in Compliance with Title III of the ADA Is Not an Unconstitutional Taking Without Just Compensation*

Zahedi contends that the expenditure of funds necessary to make the restrooms in his facility accessible to individuals in wheelchairs, if required under the ADA, would constitute a taking of private property "for public use, without just compensation" in violation of the Fifth Amendment's Due Process Clause. In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the Supreme Court delineated three situations in which a governmental restraint is considered a taking, therefore requiring compensation. These three situations are: 1) When the regulation compels a permanent physical invasion of the property; 2) When the regulation denies an owner all economically beneficial or productive use of its land; 3) When the regulation in question does not substantially advance a legitimate governmental objective. If either of the first two situations occur, the regulation will be considered a taking regardless of whether the action achieves an important public benefit or has only minimal impact on the owner. The expenditure of funds required by title III does not constitute a taking under the Fifth Amendment as defined in *Lucas*.

[Authors' Note: The remainder of this discussion is omitted, but holds that compliance with the ADA is not a physical taking, a denial of all economically beneficial or productive use of the owner's land, and Title III substantially advances a legitimate governmental interest.]

VII. *Title III does not Intrude Upon State Sovereignty in Violation of the Tenth Amendment*

[Omitted.]

VIII. *Conclusion*

A district court ... is limited to considering the constitutionality of the challenged regulations, rather than their political or economic desirability. Although members of the judiciary have occasionally taken forays into the political arena, I agree with Justice Frankfurter, who once noted: "The Framers carefully and with deliberate forethought refused to so enthrone the judiciary."

Having carefully considered each of Zahedi's constitutional challenges, it is clear that none of these challenges can prevail. The United States' cross-motion for summary judgment is granted. Zahedi's motion for summary judgment is denied, and Zahedi's counterclaim is dismissed.

Note

Wilderness Areas: Must the Grand Canyon be accessible? The answer is "sort of." Congress

recognized that many wilderness areas would be infeasible to make accessible, and provided for study of this issue. 42 U.S.C. §12207. Hiking trails maintained by the United States Government would fall under this part of the ADA. What about private vendors licensed to operate in national wilderness areas? Are they subject to Title III or this federal wilderness area requirement? What would be the theories under which an individual might seek redress against a lodge that had not removed architectural barriers? Who would be the defendant(s)? The proposed regulations for wilderness areas are found at 61 Fed. Reg. 66968 (Dec. 19, 1996). They are found in final form at 36 C.F.R. 1.2.

Problems

1. If a professional football team contracts to use a stadium owned by the county, who is liable for failure to meet accessibility guidelines? Which guidelines apply, those for Title II or Title III? Alexandra Hardy, *Disabled Hope Dome Pact Means More Than Seats*, HOUSTON POST, June 26, 1993, at A29.

2. Must a state-operated lottery program ensure that all vendors of lottery tickets meet accessibility requirements? The State of Texas has implemented a policy of inspecting stores with lottery licenses and revoking those licenses where the merchants do not meet Title II accessibility standards. According to a 1994 survey by the Texas Lottery Commission, 65 percent of Lottery Retailers have obstacles to people with disabilities from the door to the checkout counter. Retailers are entitled to a one percent bonus of lottery winnings, but the money can be withheld if the store does not meet disability requirements.

Lottery programs are an interesting avenue for encouraging access because of the method of distribution. The state agency granting the license to sell lottery tickets does not necessarily have to demonstrate accessibility to receive the license, although there should be an expectation of accessibility. When lottery programs sell winning tickets, the states have an opportunity to check for access before giving the vendor the share for selling the winning ticket. This has the potential for being an area for advocates to monitor and enforce. For additional cases on lotteries, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §6:13 (2012 and cumulative supplement). Should states be required to monitor access before granting the license? See *Paxton v. State Dept. of Tax & Revenue*, 192 W. Va. 213, 451 S.E.2d 779 (1994) (holding that the state lottery commission is required by the ADA to ensure that vendors selling lottery tickets be accessible).

3. Is an adult nightclub with a stage for nude dancing in violation of Title I of the ADA because a nude dancer in a wheelchair would be unable to access the dance area? No one in a wheelchair had applied to work as a nude dancer at the nightclub, and the area for customers was accessible. Mike Comeaux, *L.A. Pulls the Plug on Club Shower*, HOUSTON CHRONICLE, April 21, 1994, at A19.

4. An associate minister at a church becomes mobility impaired as a result of the progressive symptoms of multiple sclerosis. The church refuses to build ramps or make other structural changes to provide her access to carry out her job. Does this violate the ADA? Steven A. Holmes, *When the Disabled Face Rejection From Churches That Nurtured Them*, N.Y. TIMES, Sept. 30, 1991, at A8.

[c] New Construction

It can certainly be challenging to retrofit existing facilities, so it is understandable if that has not been done in many instances. It is less understandable when a new facility subject to the ADA or other discrimination statute is built without meeting access design standards. There are some standards that are not as clear, and there are occasionally conflicts between federal, state, and local requirements. One of the questions that arises when there is new construction that is not in compliance is whether the party who contracted to have the facility built is the only party liable, or whether the architects and/or engineers might also be directly liable under the ADA or other statute. The following case highlights one perspective. It also demonstrates how substantive protection is only

the first step to compliance. Without adequate enforcement or remedies, the promise of these requirements may not be met.

The following case provides one opinion about the liability of architects for noncompliance with design standards.

Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers

945 F. Supp. 1 (D.D.C. 1996)

THOMAS F. HOGAN, DISTRICT JUDGE.

The plaintiffs brought this action seeking declaratory and injunctive relief in connection with the building of the MCI Center, a sports and multi-purpose arena now being erected in Washington, D.C. In Count I of the complaint, the plaintiffs allege that the design and construction of the arena violate the ADA. Among the named defendants are Ellerbe Becket Architects & Engineers, P.C. and Ellerbe Becket, Inc. The former is the architectural and engineering firm that designed the arena, and the latter is its parent company. These two defendants argue that the ADA does not hold architects liable for the design and construction of facilities in violation of the statute's provisions.

Two provisions of the ADA are relevant to architects' potential liability. First, §302(a) states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of ... any place of public accommodation by any person who owns, leases ... or operates a place of public accommodation." It is conceded in this case that the Ellerbe defendants do not own, lease, or operate the MCI Center. This is typical of construction work: architects generally provide their design services by contract to other parties involved in the project. Therefore, standing alone, §302(a) does not provide grounds for a suit against the Ellerbe defendants.

The next provision of the ADA, §303, is entitled "New construction and alteration in public accommodations and commercial facilities," and states that as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes ... a failure to design and construct facilities ... that are readily accessible to and usable by individuals with disabilities.

The plaintiffs argue that since §303 mentions the design function, the provision encompasses architects. However, the plain language of the statute reveals at least two reasons why this argument is untenable. First, the phrase "design and construct" is distinctly conjunctive. It refers only to parties responsible for both functions, such as general contractors or facilities owners who hire the necessary design and construction experts for each project. Since architects in general, and the Ellerbe defendants in particular, are not responsible for both the design and the construction of the MCI Center, §303 does not refer to them. Second, §303 defines "discrimination for purposes of §302(a)." Therefore, the limitation in §302 to owners, operators, and lessors also applies to §303 and thereby excludes architects from liability under the section.

The United States Department of Justice filed an amicus brief arguing that its interpretation of §303, which includes architects as liable parties, should be awarded the deference described in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). However, the issue of such deference only arises when the statute is ambiguous. "If the intent of Congress is clear, that is the end of the matter." Because the plain language of the statute makes clear that architects are not covered by §§302 and 303 of the ADA, there is no need for the Court to apply the second part of the *Chevron* analysis and consider the interpretation pressed by the Department of Justice.

The Court's interpretation does not frustrate the intent of the statutory scheme. If entities who are responsible for both design and construction can be held liable for violations of the ADA, those entities will ensure that the firms or individuals with whom they contract—experts in design or construction—will hew to the dictates of the statute and regulations. If a violation is nonetheless alleged, interested parties with standing may seek effective relief by naming as defendants the high-

level entities responsible for both design and construction, as the remaining defendants in this case are aware.

Notes

1. On April 24, 1998, Ellerbe Becket architectural firm entered into a consent decree with the Department of Justice in which they agreed that future designs would ensure appropriate line of sight seating for wheelchair users. In addition to the MCI Center, the firm had designed four other sports arenas that were the subject of the original Department of Justice Act. The Department itself agreed not to bring enforcement actions with respect to any of those facilities. The settlement leaves undecided whether architects or architectural firms may be held liable under Title III of the ADA, nor does it resolve suits brought by private plaintiffs, such as Paralyzed Veterans. *United States v. Ellerbe Becket, Inc.*, C.A. No. 4-96-995 (D. Minn. Consent Decree 1998). For additional cases on this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §6:13 (2012 and cumulative supplement).

2. There has been a substantial amount of litigation involving stadium seating in movie theaters. The issue is whether the front row seats, which are accessible to wheelchair users, provide reasonable access. The angle of view can be quite uncomfortable for anyone, but particularly an individual with a spinal cord injury or other mobility impairment. The stadium seating areas have generally been designed so that they are reached only by use of steps. The current trend by most, although not all, courts is that such design violates the ADA because it does not allow for a comparable line of sight for viewing angles. Effective March 15, 2011, both the Title II and Title III regulations ensure ticketing for accessible seating in stadiums and arenas. 28 C.F.R. §35.138 and §36.302(f). The revised regulations also clarify requirements for new construction of stadium style theater spaces. This section also provides requirements for other assembly area seating and dispersal of seats. 28 C.F.R. §35.151(g). See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW Ch. 5 (2012 and cumulative supplement), for cases on this issue.

E. Exemptions from the ADA and Special Situations

[1] Religious Entities

Title III of the ADA does not apply to "religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. §12187; 28 C.F.R. §36.102(e). The analysis accompanying the regulations clarifies the application. For example:

> [I]f a church itself operates a day care center, a nursing home, a private school, or a diocesan school system, the operations of the center, home, school or schools would not be subject to the requirements of the ADA ... merely because the services provided were open to the general public. The test is whether the church or other religious organization operates the public accommodation, not which individuals receive the public accommodation's services....
>
> The test [is] whether the church or other religious organization controls the operations of the school or of the service or whether the school or service is itself a religious organization....
>
> [A] public accommodation ... that operates a place of public accommodation in leased space on the property of a religious entity, which is not a place of worship, is subject to the rule's requirements if it is not under control of a religious organization.

46 Fed. Reg. 35554 (July 26, 1991).

Problem

Would a private Jewish day school that receives federal financial assistance through meal subsidies

be subject to any mandates relating to nondiscrimination on the basis of disability? What information would be necessary to decide this question?

[2] Private Clubs

Just as private clubs are exempt from other federal civil rights statutes, Title III of the ADA specifically exempts private clubs or establishments, except to the extent that the facilities are made available to customers or patrons of a place of public accommodation. 42 U.S.C. §12187; 28 C.F.R. §36.102(e). The definition of what constitutes a private club is found in Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000-a(e). Courts deciding whether the exemption applies have considered factors such as

> the degree of member control of club operations, the selectivity of the membership selection process, whether substantial membership fees are charged, whether the entity is operated on a nonprofit basis, the extent to which the facilities are open to the public, the degree of public funding, and whether the club was created specifically to avoid compliance with the Civil Rights Act.

56 Fed. Reg. 35552 (July 26, 1991).

For example, a wedding held at a country club where membership is truly private would not be subject to Title III of the ADA. If, however, a continuing education program were held at the club, sponsored by a private entity with enrollment open to the public, the exemption would probably not apply for purposes of the event.

The case of *Martin v. PGA Tour, Inc.* excerpted *supra* in section A should be reviewed at this point.

An interesting issue is whether fraternities and sororities on college campuses are protected from liability because of the private club exception. The answer may depend on who owns the property (the university or the Greek organization). Regulation of fraternities and sororities may indirectly affect this. A university might deny official recognition to a fraternity or sorority that does not comply with at least some aspects of the ADA or Section 504.

Problems

1. If an individual using a wheelchair wishing to attend the education program found that barriers had not been removed to make attendance possible, would there be liability against the club, the sponsor of the education program, or both entities? Assume that barriers could be removed without undue burden.

2. Is a Boy Scout troop that uses donated space in a private club subject to Title III requirements? Is the club? See 56 Fed. Reg. 35556 (July 26, 1991).

3. Would a private club operating a day care center open only to its own members be subject to Title III? What about a church that offers day care only to members? See *id*.

[3] Mixed Use Residential Facilities

One of the specified categories of public accommodations relates to places of lodging. The statute lists the following:

> an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.

42 U.S.C. §12181(7)(A). The regulations clarify that facilities covered by the Fair Housing Act of 1968, as amended in 1988, 42 U.S.C. §3601 et seq., are not subject to Title III mandates. 28 C.F.R. §36.104. Thus, an apartment building would be subject to the Fair Housing Act, but probably not Title

III of the ADA.

It has been recognized, however, that facilities may have mixed use.

> For example, in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA because of the nature of the occupancy of that part of the facility. This residential wing would, however, be covered by the Fair Housing Act. The separate nonresidential accommodations in the rest of the hotel would be a place of lodging, and thus a public accommodation subject to the requirements of this final rule. If a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility.
>
> ... Although [residential] hotels or portions of such hotels may fall under the Fair Housing Act when operated or used as long-term residences, they are also considered "places of lodging" under the ADA when guests of such hotels are free to use them on a short-term basis. In addition, "single room occupancy hotels" may provide social services to their guests.... In such a situation, the facility would be considered a "social service center establishment" and thus covered by the ADA as a place of public accommodation, regardless of the length of stay of the occupants.

56 Fed. Reg. 35552 (July 26, 1991) (Regulatory Analysis).

Problem

Would homeless shelters or battered women's shelters be subject to the Fair Housing Act, Title III of the ADA, or any other statutes? What information would be needed to decide this issue?

[4] Leased Space

The regulations under Title III of the ADA provide that

> Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.

28 C.F.R. §36.201(b).

The analysis of this regulation is interesting in its recognition of allocating responsibility when the lease is either silent on the tenant's right to make alterations or where the lease prohibits the landlord from entering the premises to make alterations. The analysis further notes the issue that is raised when a lease contains a "compliance clause," allocating responsibility for complying with various legal requirements. The analysis also recognizes a number of practical problems with this kind of shared responsibility. Other questions relating to short term leases were raised. The interpretation of the regulation, however, specifies that the time remaining in a lease is not a factor in allocating responsibility for accessibility, but is relevant to the factual issue of what is readily achievable in a particular instance. 56 Fed. Reg. 35555–35556 (July 26, 1991). The analysis somewhat naively notes that

> As between the landlord and tenant, the extent of responsibility for particular obligations may be, and in many cases probably will be, determined by contract.

Id. at 35556. First, many long term leases, such as a lease by a major department store in a shopping center, may have been negotiated long before 1990. These leases may include general compliance clauses, but were not written in contemplation of the major affirmative responsibilities that would accrue as a result of the ADA. Second, many leases are silent on these types of responsibilities. Questions arising from the landlord/tenant relationship are likely to be the subject of much debate, either through negotiation of new leases or renegotiation of existing leases or through litigation after an individual with a disability seeks relief against the landlord and/or tenant. See Wade Lambert,

Disabilities Act May Spur Lease Changes, WALL ST. J., April 5, 1994, at B7.

Problems

1. If a restaurant leasing space in a building refuses to seat a patron because he or she is blind, who is likely to be liable as between the restaurant owner and the building owner in a Title III action? What if the restaurant has inaccessible restrooms? See 56 Fed. Reg. 35556 (July 26, 1991). See James R. Carrsel, *Veterans Take Aim at Hilton*, COURIER JOURNAL, May 8, 2006, at A1 (regarding termination of a restaurant lease with a hotel and disputes over access).

2. What if the lease in the previous problem specified a "no pets" rule, and the tenant refused to allow a blind patron's guide dog onto the premises as a result, who is likely to be liable as between the restaurant owner and the building owner in a Title III action? See 56 Fed. Reg. 35556 (July 26, 1991).

[5] Parent/Subsidiary Responsibility

Like the landlord/tenant issue, the parent/subsidiary relationship promises to be a topic of debate. The responsibility for nondiscrimination, for removing barriers and for making other accommodations will have to be resolved on a case-by-case basis. The Department of Justice responded to numerous commenters seeking guidance about this issue in its analysis of the Title III regulations by stating just that. The Department recognized that the wide variety of relationships between parent corporations and other entities made it "unwise" to establish specific guidance. The factors to be considered, however, in order of priority are

> the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and ... [i]f applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

28 C.F.R. §36.104 (definition of *undue burden*); 56 Fed. Reg. 35553–35554 (July 26, 1991).

Cases have begun to address liability of parent companies. In *United States v. Days Inns*, 997 F. Supp. 1080 (C.D. Ill. 1998), the court held that the parent company may be liable for ADA design violations because of its careful licensing and planning involvement in the design and construction of hotels. Decisions on this issue are likely to be individualized and should focus on the specific involvement of the parent or franchisor in architectural design. For additional cases on this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §6:13 (2012 and cumulative supplement).

Problem

Most drive-through service lines for fast food restaurants do not have a communication mechanism permitting individuals with hearing impairments to communicate over the microphone. As between the parent corporation of a major national chain and the local franchisee, who should bear the responsibility for providing accommodations for individuals with hearing impairments?

[6] Private Homes

A physician working out of his or her home is an example of when Title III of the ADA would apply to a private home. Other common examples are day care centers, real estate businesses, and law practices operated out of one's home.

The regulations under Title III specify that

> When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this part, but that portion used

exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for residential purposes is covered by this part.

28 C.F.R. §36.207(a).

Problem

Would a physician be required to make the bathroom in his or her home accessible? What about the entry to the house? 56 Fed. Reg. 35559–35560 (July 26, 1991).

[7] Smoking

Pressure from a variety of interest groups has made smoking in public places (as well as in the workplace) less and less popular. Most states and local governments, however, have not prohibited smoking altogether. More likely is the decision of a place of public accommodation or an employer to prohibit smoking or to restrict smoking to specific areas. Perhaps recognizing the potential for smokers to claim that their addictions should be accommodated (leaving aside whether addiction to tobacco is a protected disability), the ADA specifies that nothing in the ADA should "be construed to preclude the prohibition of, or the imposition of restrictions on, smoking...." 42 U.S.C. §12210(b); 28 C.F.R. §36.210. See also Gottlieb, Daynard & Lew, *Second-Hand Smoke and the ADA: Ensuring Access for Persons with Breathing and Heart Disorders*, 13 ST. LOUIS U. PUB. L. REV. 635 (1994). Nonetheless, the regulators specifically declined to prohibit or restrict smoking in places of public accommodation. Already attempts have been made by litigants to extend the interpretation of Title III of the ADA to do so.

Emery v. Caravan of Dreams

879 F. Supp. 640 (N.D. Tex. 1995)

SANDERS, DISTRICT JUDGE.

Findings of Fact

2. Plaintiff Emery has cystic fibrosis, a progressive genetic disease of the respiratory and digestive systems. As a result of her disability, she is substantially impaired in the major life function of breathing.

3. Plaintiff Young is allergic to tobacco, ragweed, pollen, and dust mites. She has also been diagnosed as having asthma.

4. Plaintiff Young leads a normal life, according to Dr. Michael. She has worked continuously as a flight attendant for American Airlines for twenty-nine years. She is learning how to roller blade. Her allergies and asthma do not substantially impair any major life function.

5. Cigarette smoke is an irritant to mucous membranes in general, and to respiratory tissue in particular. It increases mucus production in the lungs, and patients with cystic fibrosis have a difficult time moving mucus out of their lungs. The presence of mucus in the lungs increases the chance that opportunistic bacterial infections will develop. Most cystic fibrosis patients die from opportunistic bacterial infections.

6. Plaintiff Emery's physician has advised her to avoid cigarette smoke whenever possible. After two or three breaths of cigarette smoke, Plaintiff Emery begins to wheeze and cough; this lasts from twenty to twenty-five minutes.

7. For non-smoking patrons, Defendant provides a non-smoking section in the first two rows of seats in the theater.

8. Defendant's policy of allowing smoking in all areas of the theater except for the seats reserved for non-smoking patrons has the effect of denying Plaintiff Emery access to Defendant's musical

venue.

9. The only accommodation that would allow Plaintiff Emery to have access to Caravan of Dreams is a complete ban on smoking when Plaintiff attends a performance.

10. Banning smoking in the Caravan of Dreams would have a major adverse economic effect on the Defendant, and would endanger the Defendant theater's viability. Nationally known performers would not play at the club if smoking were not permitted.

11. Defendant's only requirement for admission to a show is possession of a ticket.

Conclusions of Law

A. *Background Conclusions*

1. Defendant Caravan of Dreams is a public accommodation under the ADA.

2. Plaintiff Young is not a person with a disability as that term is defined in the ADA. Although Young has a physical impairment, that impairment does not substantially limit any major life activity as required by the ADA.

3. The regulations promulgated under the ADA define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." As the Justice Department's explanation of the regulations notes, whether or not an allergy to cigarette smoke can be termed a disability within the meaning of the ADA requires a case-by-case analysis of whether the respiratory or neurological functioning is so severely affected that it impairs a major life function.

4. Testimony showed that Plaintiff Young is not substantially impaired in her ability to work, recreate, breathe or to have a normal life. Accordingly, she is not disabled within the meaning of the ADA.

5. Plaintiff Emery is a person with a disability as that term is defined under the ADA. She is substantially impaired in the major life activity of breathing.

B. *Discrimination Conclusions*

1. The findings and conclusions previously made do not end the Court's inquiry. The Court must still determine whether Emery has been discriminated against on account of her disability.

2. Section 302(a) of Title III of the ADA establishes a general rule that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation...."

5. Plaintiffs here have insisted that their claim is based on §302(b)(2)(A)(i). That section states that discrimination includes "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered."

6. Plaintiffs argue that because Defendant allowed smoking, Defendant has imposed eligibility criteria which screen out persons with severe respiratory ailments. The Court concludes that Plaintiffs' argument amounts to a torturous misreading of the statutory language just quoted, and that it is without merit.

Plaintiffs' argument fails with respect to the term "criteria." No case authority being available, the Court turns first to Webster's New Universal Unabridged Dictionary, which defines criterion as "a standard of judging; any established law, rule, principle or fact by which a correct judgment may be formed." "Criteria" thus implies the necessity of making a judgment, and because judging is necessarily an active rather than a passive endeavor, the Court views the quoted section as applying

only to those rules or policies that are or could be used to make a specific or conscious decision as to whether or not to permit an individual or individuals to have access to goods, services, facilities, privileges, advantages, or accommodations which are being offered in this case by Defendant.

The Department of Justice commentary on the regulations supports the reading and analysis which I have just given. The Justice Department stated that it would violate the regulation implementing this section to "bar, for example, all persons who are deaf from playing on a golf course or all individuals with cerebral palsy from attending a movie theater, or limit the seating of individuals with Down's syndrome to only particular areas of a restaurant." Each of these decisions would involve a conscious decision directed at who will have access to the services offered by the public accommodation.

The smoking policy in question in this case clearly does not fall within the Court's construction or a fair analysis of §302(b)(2)(A)(i). The only criterion for eligibility or access to Defendant's theater is the possession of a ticket. Plaintiffs are therefore not entitled to recover under §302(b)(2)(A)(i).

7. Plaintiffs' suit appears to come within the provisions of §302(b)(2)(A)(ii), which provides that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."

As I understood Plaintiffs' testimony and evidence, a modification of Defendant's smoking policy would be necessary in order for Plaintiffs to take advantage of Defendant's facilities. Plaintiffs requested that Defendant modify its policy, and Defendant refused to do so. Plaintiffs do not base their case on a violation of §302(b)(2)(A)(ii). I cover it, however, because it's another possibility here.

In the Court's view, even if Plaintiffs had relied on Section 302(b)(2)(A)(ii), their claim would fail because the section provides that a failure to make necessary modifications to policies is not discrimination under the ADA, when such modifications would fundamentally alter the services offered. It should be noted that there is some similarity between this provision and a similar phrase in the section under which Plaintiffs brought their case.

The "fundamental alteration" test is rooted in the Supreme Court's opinion in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), a Rehabilitation Act case. There the Court held that a college was not required to modify its clinical nursing program by converting it to a program of purely academic classes to accommodate a woman with a hearing impairment. The Court held that such a modification would amount to a "fundamental alteration" in the nature of the program, which was more than the Rehabilitation Act required. I understand that preceded the ADA, but it's a reference to the same phrase which makes it important to the Court.

8. Defendant's President testified that banning smoking would have a major economic impact and would result in major national bands not coming to play at Caravan of Dreams. This testimony was not contradicted. The uncontroverted evidence is that the requested modification would endanger Defendant's viability as a business, and such modifications are not required.

Problems

1. What would the likely result be if a less healthy plaintiff had brought this suit?

2. Does the fact that major bands would not play there matter? Isn't this somewhat like the customer/coworker preference argument, which is generally not allowed as an exemption from compliance?

Notes and Questions

1. In the previous case, the court found that Ms. Young did not have a disability. Would a court

today be as likely to reach that decision under the ADA Amendments Act of 2008, which broadens the definition and makes it more likely that individuals with asthma and allergies will be covered? Or will she still have to make a stronger case that these conditions substantially limit her major life activity of breathing in more than a bar-type setting?

2. The fact that the *Emery* case was decided in 1995 is also significant. For a variety of reasons, the political climate for making more public places smoke free has changed substantially. The following case involves a fast food restaurant. These places are more likely to be smoke free in most states today. Would that be the same for the *Caravan of Dreams* type settings?

The following case involves a different type of facility—a fast food restaurant rather than a nightclub—and children rather than adults.

Staron v. McDonald's Corp.

51 F.3d 353 (2d Cir. 1995)

WALKER, CIRCUIT JUDGE:

These actions are brought by three children with asthma and a woman with lupus against two popular fast-food restaurant chains, McDonald's Corporation ("McDonald's") and Burger King Corporation ("Burger King"). Plaintiffs claim that defendants' policies of permitting smoking in their restaurants violate §302 of the Americans with Disabilities Act (the "ADA" or "Act").

Background

The facts alleged in plaintiffs' complaints are rather straightforward. During one week in February, 1993, each plaintiff entered both a McDonald's and a Burger King restaurant in Connecticut. Each plaintiff found the air in each restaurant to be full of tobacco smoke, and, because of his or her condition, was unable to enter the restaurant without experiencing breathing problems. Each plaintiff has also encountered similar difficulties at other times in other restaurants owned by McDonald's and Burger King.

After registering complaints with the defendants and the State of Connecticut Human Rights Commission without satisfactory results, plaintiffs filed separate suits against McDonald's and Burger King on March 30, 1993. Their complaints alleged that the defendants' policies of permitting smoking in their restaurants constituted discrimination under the Act. Each complaint requested a declaratory judgment that such policies are discriminatory under the ADA, as well as an injunction to prohibit defendants from maintaining any policy which interfered with plaintiffs' rights under the Act, "and more specifically to require [defendants and their franchisees] to establish a policy of prohibiting smoking in all of the facilities they own, lease, or operate."

[The lower court granted the defendants' motion to dismiss.]

The ADA and cases interpreting it do not articulate a precise test for determining whether a particular modification is "reasonable." However, because the Rehabilitation Act, which applies to recipients of federal funding, uses the same "reasonableness" analysis, cases interpreting that act provide some guidance.

The Supreme Court, addressing the issue of the reasonableness of accommodations under the Rehabilitation Act in the employment context, stated that "[a]ccommodation is not reasonable if it either imposes 'undue financial and administrative burdens' ... or requires 'a fundamental alteration in the nature of [the] program.'" Other courts have articulated factors that they consider relevant to the determination, including the nature and extent of plaintiff's disability.

Although neither the ADA nor the courts have defined the precise contours of the test for reasonableness, it is clear that the determination of whether a particular modification is "reasonable"

involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.

While there may be claims requesting modification under the ADA that warrant dismissal as unreasonable as a matter of law, in the cases before us a fact-specific inquiry was required. None has occurred at this early stage of the suits. The magistrate judge instead concluded—and the district court agreed—that plaintiffs' request for a ban on smoking in all of defendants' restaurants was unreasonable as a matter of law. The magistrate judge offered two grounds for this conclusion: first, that "the ADA, by itself, does not mandate a 'blanket ban' on smoke in 'fast food' restaurants," and second, that "[i]t is not reasonable, under the ADA, to impose a blanket ban on every McDonald's [and Burger King] restaurant where there are certain restaurants which reasonably can accommodate a 'no-smoking' area." We believe that neither ground justifies dismissal of the complaints.

I. *The Permissibility of Smoking Bans Under the ADA*

The magistrate judge correctly noted that the ADA on its face does not ban smoking in all public accommodations or all fast-food restaurants. Defendants carry this point a significant step further, however, and argue that the ADA precludes a total smoking ban as a reasonable modification. They assert that Congress did not intend to restrict the range of legislative policy options open to state and local governments to deal with the issue of smoking. Their argument rests on §501(b) of the ADA: Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision ... that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking ... in places of public accommodation covered by subchapter III of this chapter. The magistrate judge echoed a sentiment similar to defendants', stating that "[t]he significant public policy issues regarding smoking in 'fast food' restaurants are better addressed by Congress or by the Connecticut General Assembly...."

It is plain to us that Congress did not intend to isolate the effects of smoking from the protections of the ADA. The first sentence of §501(b) simply indicates that Congress, states, and municipalities remain free to offer greater protection for disabled individuals than the ADA provides. The passage does not state, and it does not follow, that violations of the ADA should go unredressed merely because a state has chosen to provide some degree of protection to those with disabilities.

As to the second sentence of §501(b), the Department of Justice regulations state that it "merely clarifies that the Act does not require public accommodations to accommodate smokers by permitting them to smoke." Nothing in the second sentence precludes public accommodations from accommodating those with smoke-sensitive disabilities. In fact, this language expressly permits a total ban on smoking if a court finds it appropriate under the ADA. We therefore reject any argument by defendants to the contrary.

Cases in which individuals claim under the ADA that allergies to smoke constitute a disability and require smoking restrictions are simply subject to the same general reasonableness analysis as are other cases under the Act.

II. *The Scope of Plaintiffs' Proposed Accommodation*

The magistrate judge's principal objection to plaintiffs' proposed modification was that plaintiffs were seeking a total ban on smoking in all of defendants' restaurants even though "there are certain restaurants which reasonably can accommodate a 'no-smoking' area." We do not think that it is possible to conclude on the pleadings that plaintiffs' suggested modification in this case is necessarily unreasonable.

To be sure, the few courts that have addressed the question of reasonable modification for a smoke-

sensitive disability have found a total ban unnecessary. See *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. at 1303–04, 1307; *Vickers v. Veterans Admin.*, 549 F. Supp. at 87–89. Yet these courts only reached this conclusion after making a factual determination that existing accommodations were sufficient. In granting summary judgment to the defendant, the *Harmer* court concluded that the plaintiff could perform the essential functions of his job with the modifications already made by the defendant, which included moving smokers further from the plaintiff's desk, mandatory use of smokeless ashtrays, and installation of air filtration and oxygen infusion devices. In *Vickers*, the court found after a bench trial that the nine steps defendants had taken to alleviate plaintiff's suffering constituted sufficient accommodation, and that a total ban was therefore not necessary. *Vickers*, 549 F. Supp. at 87–88. Neither case held that a ban on smoking would be unreasonable if less drastic measures were ineffective, much less that a ban on smoking is unreasonable as a matter of law.

Plaintiffs in this case are entitled to the same opportunity afforded to the plaintiffs in *Harmer* and *Vickers* to prove that a ban on smoking is a reasonable modification to permit them access to defendants' restaurants. Given that McDonald's has voluntarily banned smoking in all corporate-owned restaurants, the factfinder may conclude that such a ban would fully accommodate plaintiffs' disabilities but impose little or no cost on the defendants. The magistrate judge's unsupported assumption that certain restaurants "reasonably can accommodate a 'no-smoking' area" does not obviate the need for a factual inquiry. Plaintiffs have alleged that, regardless of the different structural arrangements in various restaurants, the environment in each establishment visited by the plaintiffs contained too much smoke to allow them use of the facilities on an equal basis as other non-disabled patrons. These allegations belie the magistrate judge's assumption that no-smoking areas offer a sufficient accommodation to plaintiffs. In such a case, it is not possible to conclude that "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Accordingly, defendants' motions to dismiss should have been denied.

In addition, we note that plaintiffs do not solely request a ban on smoking. Their complaints ask that defendants be enjoined "from continuing or maintaining any policy" that denies plaintiffs access to their restaurants, as well as "such other and further relief as it may deem just and proper." We do not think that it is necessary at this point in the lawsuit to bind plaintiffs to the one specific modification they prefer. If plaintiffs should fail in their quest for an outright ban on smoking, they may still be able to demonstrate after discovery that modifications short of an outright ban, such as partitions or ventilation systems, are both "reasonable" and "necessary," and plaintiffs should be allowed the opportunity to do so.

Defendants raise another objection to the scope of plaintiffs' request for an injunction. They contend that plaintiffs' request for a smoking ban is unreasonable because it applies to all of defendants' restaurants "regardless of whether these four Plaintiffs have ever visited, will visit, might visit or never will visit" the many McDonald's and Burger King restaurants across the country. This objection pertains to the permissible scope of injunctive relief in this case, an issue which neither the magistrate judge nor the district court has reached. But whatever may be the appropriate scope of an injunction, doubts about that scope do not justify dismissal of the complaints where plaintiffs have alleged cognizable claims at least with respect to the restaurants they expect to visit.

We therefore reverse the judgments of the district court and remand for proceedings consistent with this opinion.

Note

One of the procedural barriers to cases such as the *McDonald's* case and many of the architectural barrier cases against places of accommodation is whether the plaintiff has standing. Several cases have now addressed whether the plaintiff must demonstrate an intent to return or a likelihood of returning. Some of this litigation has occurred because of what are sometimes referred to as

"vexatious litigants." For additional discussion of that issue, see Section 4[H][1] Enforcement under the ADA, *infra.*

F. Air Transportation

It has been argued that limitations on transportation are a violation of the constitutional right to travel. This generally will be a successful argument only if there is a direct limitation of some sort by the state or federal government. Usually the limitations on individuals with disabilities are not direct, but are instead indirect—created primarily by design barriers.

The importance of transportation to an active involvement in everyday life—work, education, recreation—is obvious. Imagine that all of the buildings in the United States had been designed to be barrier free, and that employers provided all the necessary reasonable accommodation for employees with disabilities to carry out their jobs, but that the transportation policies do not provide for access. The individual with epilepsy might be unable to obtain a driver's license and might be unable to get to work as a result. The individual with a mobility impairment might be able to obtain a driver's license and buy a specially-designed vehicle, but unless adequate parking were provided, there would still be difficulties in gaining access. If that individual wanted to use mass transit, in most cities there would be problems with doing so, although the mass transit requirements of the Americans with Disabilities Act have made improvements. In the past, the airlines provided little assistance for the traveler with a disability.

There is not much judicial analysis of transportation issues relating to individuals with disabilities. This is because most of the legal requirements only recently have become more clearly established. In assessing transportation access, it is necessary to examine policies relating to the vehicle, the fixed facilities, and practices and policies relating to transportation.

Until 1986, there was little comprehensive application of nondiscrimination policy to airline transportation. This was because airlines are not generally recipients of federal financial assistance and are not subject to Section 504 of the Rehabilitation Act. Airport terminals were recipients of federal financial assistance and were required to be accessible, but this was of little comfort to the passenger with a disability who could not get on the plane.

In 1986, the Supreme Court addressed a case in which it was claimed that airlines were subject to Section 504 by virtue of receiving grants from a federal trust fund for airport operators and by receiving benefits from the operation of the air traffic control system. The following is a brief statement of the holding in the case.

United States Department of Transportation v. Paralyzed Veterans of America

477 U.S. 597 (1986)

JUSTICE POWELL:

The grant statutes are the Airport and Airway Improvement Act of 1982.... The 1970 Act established the Airport and Airway Trust Fund, appropriations from which are used to fund airport development. The purpose of disbursements ... is to establish a "nationwide system of public airports adequate to meet the present and future needs of civil aeronautics." Congress directed the Secretary of Transportation to prepare a national airport system plan, and required airport project applications to be consistent with that plan. Funds are disbursed for a variety of airport construction projects: e.g., land acquisition, runway paving, and buildings, sidewalks, and parking. The use of the Trust Funds is strictly limited to projects that concern airports.

It is not difficult to identify the recipient of federal financial assistance under these Acts: Congress has made it explicitly clear that these funds are to go to airport operators. Not a single penny of the

money is given to the airlines. Thus, the recipient for purposes of §504 is the operator of the airports and not its users.

The Court of Appeals also held that the federally-provided air traffic control system is a form of federal financial assistance to airlines. The Federal Government spends some two billion dollars annually to run this system 24 hours a day nationwide and in various spots around the world. The air traffic controllers are federal employees and the Federal Government finances operation of the terminal control facilities. In short, the air traffic control system is "owned and operated" by the United States. For that reason, the air traffic control system is not "federal financial assistance" at all. Rather, it is a federally conducted program that has many beneficiaries but no recipients. The legislative history of Title VI makes clear that such programs do not constitute federal financial assistance to anyone.

Note

Air Carrier Access Act. After the decision in this case, Congress passed the Air Carrier Access Act of 1986, 49 U.S.C. app. §1374(c), which prohibits airlines from discriminating against individuals with disabilities. The statute does not state whether there is a private right of action to enforce this provision. The regulations implementing the Air Carrier Access Act, 14 C.F.R. pt. 382, provide clarification of the reasonable accommodation requirements under the statute. The statute contemplates the same principles that are found under other disability nondiscrimination statutes—i.e., the definitional coverage of who is a person with a disability is similar; reasonable accommodation is contemplated; least restrictive environment is contemplated; and airlines are not expected to make fundamental alterations to their program. There are still a number of issues left open even with the statute and promulgation of regulations. The following case illustrates some of the issues left unresolved. Other issues include exclusion from emergency row seating and other areas. For cases under the ACAA, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW Ch. 8 (2012 and cumulative supplement).

The following case is one of the first decisions under the Air Carrier Access Act, and raises several of the issues that still have not been resolved in a compelling fact setting. In reading the case, one should question whether the lack of awareness of federal changes in the law would make a difference today, more than two decades after the ACAA. In a jurisdiction that recognized damages, would it be more likely that higher punitive damages would be awarded today than in 1989?

Tallarico v. Trans World Airlines, Inc.

881 F.2d 566 (8th Cir. 1989)

BEAM, CIRCUIT JUDGE:

I. *Background*

Polly Tallarico, who is fourteen years old, has cerebral palsy which impedes her ability to walk and talk. She generally uses a wheelchair, but is able to move about on her own by crawling. Although Polly is able to speak only short words, she is able to hear and understand the spoken word. She communicates by use of a variety of communication devices such as a communication board, a memo writer and a "Minispeak."

On November 25, 1986, the day before the Thanksgiving holiday, Polly arrived at Houston's Hobby Airport intending to fly to St. Louis, Missouri, unaccompanied. When the TWA ticket agent, Richard Wattleton, learned that Polly intended to fly alone he contacted Lynn Prothero, acting TWA station manager, and asked for directions as to how he should handle the situation. Wattleton had learned from the limousine driver assisting Polly that she could not speak or walk. Wattleton relayed this

information to Prothero and also informed her that Polly could communicate by use of a communication board. From this information, Prothero determined that Polly would not be allowed to fly unaccompanied and informed Wattleton of her decision. This decision was apparently made on the basis of Prothero's conclusion that Polly could not take care of herself in an emergency and could not exit the plane expeditiously. As a result of this decision, Polly's father had to fly to Houston to accompany Polly to St. Louis.

The Tallaricos brought suit alleging that TWA violated the ACAA by denying Polly the right to board the plane because of her physical handicaps. The jury found for the Tallaricos awarding damages in the amount of $80,000. The district court entered judgment notwithstanding the verdict on the issue of damages reducing the award to $1,350 which is equivalent to the Tallaricos' actual out-of-pocket expenses.

II. *Discussion*

A. *Private cause of action*

Logic dictates that we begin with TWA's cross-appeal in which TWA contends that the ACAA does not provide for a private cause of action. The Act states that "[n]o air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation." 49 U.S.C.App. §1374(c)(1) The ACAA does not expressly provide for a cause of action to enable private citizens to seek a remedy for a violation of the Act. Consequently, we must determine if a private cause of action is implied under the ACAA.

TWA claims that Polly is not an intended beneficiary of the ACAA because the Act is intended to benefit only "otherwise qualified handicapped individuals." Because we find that Polly is an otherwise qualified handicapped individual, we do not need to decide whether the ACAA was intended to benefit handicapped persons who are not otherwise qualified.

No definition of otherwise qualified handicapped individual is given in the Act. Although the ACAA requires the Secretary of Transportation "to promulgate regulations to ensure nondiscriminatory treatment of qualified handicapped individuals," no regulations were in effect at the time of the incident. However, the legislative history of the Act states that the definition of otherwise qualified handicapped individual is intended to be consistent with the Department of Transportation's definition in 14 C.F.R. §382.3(c) (1988). Section 382.3(c) defines a "qualified handicapped person" as a handicapped individual (1) who tenders payment for air transportation, (2) whose carriage will not violate Federal Aviation Administration (FAA) regulations, and (3) who is willing and able to comply with reasonable safety requests of the airline personnel or, if unable to comply, who is accompanied by a responsible adult passenger who can ensure compliance with such a request. 14 C.F.R. §382.3(c) (1988). An instruction based upon section 382.3(c) was given to the jury which instruction required the jury to find that Polly was an otherwise qualified handicapped individual before it could allow her to recover. Although the jury obviously determined that Polly was an otherwise qualified handicapped individual, the district court stated in its memorandum that had it been the trier of fact, it would have concluded differently.

We agree with the jury's conclusion and hold that Polly is an otherwise qualified handicapped individual within the meaning of the ACAA. The evidence at trial showed that Polly had tendered payment for air transportation, that her carriage would not violate any FAA regulations (in fact she had flown alone before), and that she was capable of complying with the reasonable safety requests of airline personnel. The evidence demonstrated that Polly is able to crawl on her knees or her hands and knees, that she has normal intelligence, and that she is capable of communicating her needs. Polly has a variety of ways of communicating including the use of communication boards which contain the letters of the alphabet and some short phrases; a memo writer, an electronic typewriter-like device; and a "Minispeak," a portable computer with an electronic voice attached. Polly is able to fasten her

own seatbelt as well as put on an oxygen mask. In addition, Polly's mother testified that she was confident that Polly could crawl to the bathroom (and, presumably, an exit) on the plane if necessary. From this evidence we conclude, as did the jury, that Polly is an otherwise qualified handicapped individual and, consequently, one of the class for whose especial benefit the ACAA was enacted.

The second factor is whether there is any indication of legislative intent to create such a remedy or to deny one. As the district court noted, the ACAA was enacted in response to the Supreme Court ruling in *United States Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), which case held that section 504 of the Rehabilitation Act of 1973 applies only to those commercial airlines receiving direct federal subsidies. Congress felt that "the practical effect of [PVA was] to leave handicapped air travelers subject to the possibility of discriminatory, inconsistent and unpredictable treatment on the part of air carriers." Consequently, Congress amended the Federal Aviation Act of 1958 to specifically prohibit discrimination against otherwise qualified handicapped individuals. Relying on this portion of the legislative history and the fact that the ACAA is patterned after the Rehabilitation Act of 1973, which Act has been held to imply a private cause of action, the district court concluded that "Congress implicitly intended that handicapped persons would have an implied private cause of action to remedy perceived violations of the [ACAA]." We agree.

We believe that to allow a private cause of action is consistent with the underlying purposes of the ACAA. In addition, we conclude that the area of discrimination against handicapped persons by air carriers is not an area which is basically the concern of the states. Accordingly, we affirm the district court's decision that the ACAA impliedly provides a private cause of action.

B. *Damages for emotional injuries*

The jury awarded the Tallaricos $80,000. The district court then granted judgment n.o.v. in favor of TWA as to $78,650 of the damages award. The court concluded that there was insufficient evidence to support the total award and that as a matter of law, the award was not sustainable. The court determined that $1,350 of the award was compensation for out-of-pocket damages as a result of TWA's refusal to allow Polly to board and the remainder was damages for emotional distress. The court held that because the ACAA is an anti-discrimination statute, "as a matter of law, emotional distress damages are not recoverable for violations of the Act." In reaching this conclusion, the court relied upon cases under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973, which did not allow emotional distress damages for violations of the acts.

The Tallaricos argue that these cases should not have been relied upon by the court in making its determination as to whether emotional distress damages are allowable under the ACAA because each of the acts, Title VII, the ADEA, and the Rehabilitation Act, specifically provide a complete remedial scheme for violations. As the Tallaricos note, where a statute provides a specific remedial scheme, it is evidence that any other remedies are excluded. Because the ACAA does not provide a remedial scheme, evidence of a Congressional intent to exclude emotional distress damages does not exist.

Further, the district court's conclusion that all antidiscrimination statutes disallow emotional distress damages is incorrect. The Supreme Court has held that damages for mental and emotional distress are compensable under 42 U.S.C. §1983. In addition, damages for mental distress are allowed under 42 U.S.C. §1982 and the Fair Housing Act, 42 U.S.C. §3601 et seq. (1982). We believe that the purpose and operation of the ACAA are more closely analogous to section 1983 than to Title VII, the ADEA and the Rehabilitation Act. Consequently, we conclude that emotional distress damages are allowable under the ACAA.

The district court also held that there was no evidentiary basis for that portion of the award which exceeded the Tallaricos' out-of-pocket expenses. We disagree. "Because of the difficulty of evaluating ... emotional injuries..., courts do not demand precise proof to support a reasonable award of damages for such injuries." The Supreme Court in *Carey v. Piphus* stated that although the award "must be

supported by competent evidence," injury in the form of mental suffering or emotional anguish "may be evidenced by one's conduct and observed by others." 435 U.S. at 264 n. 20. In addition, the Seventh Circuit held that "[h]umiliation can be inferred from the circumstances as well as established by the testimony."

In this case the proof of the emotional distress which Polly suffered after TWA denied her boarding came from the testimony of her mother, her father, the assistant director for Polly's school and the driver who was with Polly when the incident occurred. Theodore Sherwood, the driver who took Polly to the airport, testified that Polly was with him when he was told she would not be allowed to board the aircraft. He stated he noticed that Polly was getting disturbed as she listened to his conversations with TWA employees. Sherwood also testified that he felt it necessary to call Polly's school to see if someone there could talk to Polly and calm her down because after the incident she was crying and upset about what had happened. Polly's father testified that Polly was very angry and upset about the incident. In addition, he stated that since the incident Polly has seemed more withdrawn, quiet and reserved. Polly's mother also testified that Polly was upset about what happened and that Polly was anxious about the situation and concerned about having to fly back to Houston after the Thanksgiving holiday. Susan Oldham, the assistant director of Polly's school, testified that prior to the incident Polly was very outgoing and socialized well with the other students. After the incident, Ms. Oldham testified, Polly seemed more withdrawn and would spend large amounts of time by herself in her room after school was over. Ms. Oldham stated that when she asked Polly if something about her trip home had upset her, Polly replied that what had happened had made her feel badly and had hurt her feelings.

We find that sufficient evidence was presented to support the jury's award of $80,000. Consequently, we reverse the district court's judgment n.o.v.

C. *Punitive damages*

At the close of the Tallaricos' evidence, the district court granted TWA's motion for a directed verdict on the issue of punitive damages. The Tallaricos assert that the court erred in granting TWA's motion because the evidence adduced by the Tallaricos was sufficient to make a prima facie case that TWA acted in such a manner as to warrant granting punitive damages. Punitive damages are awarded where the "defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard" for the rights of the plaintiff. A trial court should grant a motion for a directed verdict only if all the evidence points one way and is susceptible of no reasonable inference sustaining a finding of such behavior on the part of TWA. We apply the same standard as the trial court in considering such a motion.

The district court did not question whether punitive damages are allowed under the ACAA but instead merely concluded that there was insufficient evidence to submit the question to the jury. We agree with the district court that the Tallaricos failed to present sufficient evidence to support an award of punitive damages and similarly do not reach the question of whether punitive damages would be allowed under the ACAA.

The Air Carrier Access Act applies to nondiscrimination related to the airline's activities. That leaves open the issue of access to the fixed facilities, i.e., the airport terminal and related services, such as car rental agencies, shuttle bus service, etc. While Section 504 of the Rehabilitation Act applied to the airport terminal itself even before the Air Carrier Access Act, there were many unanswered questions. For example, what requirements applied to food vendors and.pngt shops leasing space in the airport? Most, if not all, of these questions have been resolved as a result of the passage of the Americans with Disabilities Act in 1990. Title II would apply to any aspects that were operated by a state or local governmental entities, such as a municipally operated parking garage or airport. Title III applies to private entities providing public accommodations. Thus, the food service vendors, the car rental agencies, and other private parties with services in the airport or adjoining

areas would be subject to these requirements. These issues would be covered by the ADA, as discussed earlier in this chapter.

Hypothetical Problem 4.2

Review the facts in Problem 4.1 regarding Shane's unhappy experience at the conference. What should counsel do with respect to his complaints about how he was treated during his air travel experience?

For more information on cases relating to air transportation, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §§8:1–8:3 (2012 and cumulative supplement).

Notes

1. *Treatment of Passengers During Layovers and in the Airport:* A complaint against United Airlines and O'Hare International Airport by a passenger who uses a wheelchair claimed that the ADA and the Air Carrier Access Act were violated when the passenger was not permitted to move around the terminal in an airport wheelchair during a layover. The passenger was given the option of waiting in a special room for travelers with disabilities or waiting at the gate in a standard chair. What claims are the defendants likely to make in such a case? *Michael Auberger v. City of Chicago*, No. C.A. 93C-6060 (N.D. Ill. filed Oct. 4, 1993.)

Passenger's Duty to Request Accommodations: In the case of *Adiutori v. Sky Harbor International Airport*, 880 F. Supp. 696 (D. Ariz. 1995), a passenger suffered a heart attack after difficulties and overexertion in moving from one terminal to another via a shuttle bus. A sky cap had taken him by wheelchair to the shuttle bus stop. Although he was elderly and used canes to walk, he did not request that the skycap remain with the wheelchair, nor did he request assistance in boarding the shuttle bus. Help was offered by another man, but it was refused. He also refused an offer of a seat on the shuttle bus and remained standing. The court found the evidence did not demonstrate any request for additional assistance or that any responsible party should have known that he needed assistance, Therefore, no violation of either the Americans with Disabilities Act or the Air Carrier Access Act was found.

2. *Application to Cargo Flights:* An interesting decision involved whether the Air Carrier Access Act applies to cargo carriers that allow employees to fly in available space on cargo flights. An employee of Federal Express Corporation who was disabled was denied this benefit, and successfully challenged this denial as a violation of the ACAA. *Bower v. Federal Express Corp.*, 96 F.3d 200 (6th Cir. 1996).

3. *Obligation to Provide Wheelchairs:* In *Rivera v. Delta Air Lines, Inc.*, 1997 U.S. Dist. LEXIS 14989 (E.D. Pa. 1997), the court held that Title II of the ADA does not require a city airport to provide wheelchairs for passengers with disabilities, but that the ACAA may apply to the airline and create such a requirement.

G. Telecommunications

[1] Telephones

Before the passage of the Americans with Disabilities Act, the only major federal statute addressing accessibility to telephone communication by individuals with disabilities was the Telecommunications for the Disabled Act, 47 U.S.C. §610(b), which was passed in 1982. This Act amended the Communications Act of 1934, and requires reasonable accessibility to essential telephones for individuals with hearing impairments. Essential telephones are defined as “coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons

using ... hearing aids [specially designed for telephone use].” 47 U.S.C. §610(b).

The requirements of the Telecommunications for the Disabled Act were enhanced with the passage of the ADA. Title IV of the ADA applies to common carriers that provide interstate wire or radio communications. By 1993, common carriers, as defined by the Federal Communications Commission, were to provide telecommunications relay services on an equivalent basis to voice communications service. 47 U.S.C. §§152(b), 225; 47 C.F.R. parts 0 and 64. This provision is intended to enable individuals who use telecommunications devices for the deaf (TDDs) to communicate with those who do not have such devices.

The ADA incorporates into its Accessibility Guidelines for Buildings and Facilities regulations related to construction and alterations of public telephones. 36 C.F.R. Part 36, Appendix A, Standard 4.31., 46 Fed. Reg. 35660–35662 (July 26, 1991). Whether a particular facility is required to have a telephone communication device for the deaf (TDD) depends whether a public accommodation offers users of its services the opportunity to make outgoing phone calls on more than an incidental basis. 36 C.F.R. §36.303(d). Hotels are required to have TDDs or similar devices available to allow guests who use TDDs in their rooms to communicate with the front desk and for ordering room service. 56 Fed. Reg. 35567 (July 26, 1991).

Issues of particular concern to advocates with respect to telephone service are telephone access in medical facilities and access for law enforcement purposes.

Department of Justice final regulations under the ADA relating to telecommunications became effective March 15, 2011. See 75 Fed. Reg. 56,164–236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236–358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. New provisions provide guidance regarding use of an automated-attendant system (such as voice mail and messaging) and require the system to provide effective real-time communication with individuals using auxiliary aids and services, including TTYs or other FCC-approved relay systems. 28 C.F.R. §35.161.

Problem

What kind of liability is likely against a hotel that did not have an emergency warning system or communications devices as required by the ADA, such as no TDD for the telephone, no visual or tactical alarm or warning devices, when deaf individuals are not warned of a fire that had burned for two hours before they were rescued? *Gardner v. SeaVenture Restaurant*, No. 2:94-CV-07767 (C.D. Cal. filed Nov. 17, 1994). Are damages recoverable?

The Communications and Video Accessibility Act, which is effective in October 2013, 47 C.F.R. §79.4(c)(1), requires that video content owners (not distributors) have the primary responsibility for captioning video information. It also mandated that the Federal Communications Commission issue regulations requiring “the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of the regulations.” Final regulations were issued on January 13, 2013. See 47 C.F.R. §79.4. The regulations, which prohibit private rights of action and establish an administrative complaint procedure, became effective on April 30, 2012.

[2] Television and Other Audiovisual Communication

Most television stations do not receive federal financial assistance. The major exception is public television. Because of that, Section 504 of the Rehabilitation Act does not apply to require that accommodations be made for people with disabilities. Such accommodations might include closed captioning for individuals with hearing impairments or descriptive narration for individuals with

visual impairments. A 1983 Supreme Court decision, *Community Television of Southern Cal. v. Gottfried*, 459 U.S. 498 (1983), clarified that licensing renewal was an insufficient nexus to mandate Section 504 application.

The only federal mandates related to accessibility in broadcasting television programming relate to emergency broadcasting, 47 C.F.R. §73.1250, and public service announcements, 47 U.S.C. §§152(b), 221(b), 611. In addition, the Television Decoder Circuitry Act, 47 U.S.C. §303(u), provides that television sets manufactured in the United States or sold in the United States after 1993 (with picture size of 13 inches or more) must be equipped for closed captioning. Regulations under Title III of the ADA specify the availability of closed caption decoding devices for places of lodging and hospitals. 37 C.F.R. §36.303(f).

Movie theaters are not required to ensure that the movies are captioned for individuals with hearing impairments, although there is some consideration of changing that in recent years. Where other public accommodations deliver verbal information by film, videotape or slide shows, this information must be made accessible to individuals with disabilities. Analysis of Title III Regulations, 56 Fed. Reg. 35567 (July 26, 1991). For example, a natural history museum that shows the history of mummies on a repeating videotape would apparently be required to ensure that this information is accessible. It would be a factual issue whether closed captioning, a transcript of the audio portion, a sign language interpreter, or other accommodation would be reasonable in a particular context. This portion of the analysis does not discuss whether similar accommodations, such as oral description, might be required to enable individuals with visual impairment to better appreciate the programming.

Producers of training films and other educational materials on film or videotape are not directly required to prepare such materials with captioning or to make them otherwise accessible. The employer or educational program contracting for the audiovisual materials, however, might be required to do so.

Recent requirements specify what must be provided for closed captioning of video programming. The requirements apply to television stations and video programming distributors. These FCC requirements do not allow for a private right of action. See 47 C.F.R. Section 79.1.

[3] Internet and Other Web-Based Communication

For individuals with mobility or vision impairments, the use of computer technology can be difficult or impossible unless adaptations are made. Web pages are sometimes not usable by someone who cannot see or who has difficulty using a mouse instead of a keyboard. Technical assistance is becoming available to ensure accessibility. Information can be found at www.itpolicy.gsa.gov/coca/nii.htm; www.w3.org/Press/19948/WAI-Guide); www.w3org/TR/WD-WAI-PAGEAUTH.

Although the Workforce Investment Act of 1998 (which includes §508 of the Rehabilitation Act, 29 U.S.C. §794d) requires federal departments and agencies to provide a level of information accessibility, it is less clear what is required of the private sector. There has been some initial litigation about whether websites are even entities covered under Title III of the ADA. Even where they are covered, this is an area where it is not clear what must be done. If the website meets federal accessibility standards, is that sufficient? The federal agency design regulations are found at 36 C.F.R. §1194.4. For more information on these issues, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §9:5 (2012 and cumulative supplement).

Notes

Assistive Listening System Requirements? Although movie theaters are not mandated by the ADA to provide movies with captioning, it is possible that assistive listening systems might be a reasonable accommodation required of theaters with the financial means to install them. Such devices are readily

available and easily installed, costing about $2,000 per theater screen. *Isbell & The Disability Rights Council of Greater Washington v. Cineplex Odeon Corp.*, C.A. No. 94-0679 (D.D.C. filed March 30, 1994).

The complexity of ensuring access to the Internet has been the subject of ongoing debate and discussion. Litigation has addressed the issue, but not definitively in terms of whether websites are public accommodations, what is required in terms of access, and who might have standing to bring actions. It can be expected that there will be federal guidance on these issues at some point in the future. Information on proposed regulations with respect to website communication and other issues can be found at ada.gov.

Whether websites are considered programs under Title III has not yet been clearly resolved by the courts. Compare *Cullen v. Netflix, Inc.*, slip opinion (9th Cir. 2015), available at https://d3bsvxk93brmko.cloudfront.net/datastore/memoranda/2015/04/01/13-15092.pdf (holding that they are not subject to Title III), and *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (website for Netflix not a place of public accommodation), with *National Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 26 A.D. Cas. (BNA) 1091 (D. Mass. 2012) (website is place of public accommodations in an action seeking closed captioning for all content on video streaming website). See also *National Federation of Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007), in which the court recognized that California state law is broader than federal law in applying accessibility requirements for public accommodations to all business establishments, including websites. Even if websites are subject to Title III, there is not yet clear guidance on what would be required of entities in terms of ensuring accessibility.

H. Enforcement

[1] Americans with Disabilities Act

Where the discriminating party is in violation of Title III of the ADA, Congress contemplated dual enforcement by private parties and governmental agencies. Private parties may obtain equitable relief by direct civil action in court. 42 U.S.C. §12188; 36 C.F.R. §36.501. The Attorney General of the United States also may seek to intervene. Such intervention is at the discretion of the court. 42 U.S.C. §12188(b); 36 C.F.R. §§36.501–.503. The benefit of Attorney General intervention is the potential for monetary damages, which can be awarded only if the Attorney General requests. Damages in this context include compensatory damages, such as out-of-pocket expenses, and damages for pain and suffering. 46 Fed. Reg. 35590 (July 26, 1991). Civil penalties also are available in certain instances where the Attorney General has intervened. 42 U.S.C. §12188(b)(2); 36 C.F.R. §36.504. Punitive damages are not available under Title III. 42 U.S.C. §12188(b)(4); 36 C.F.R. §36.504(c). In determining whether civil penalties should be assessed, the courts are to consider good faith efforts to comply. 42 U.S.C. §12188(b)(5); 36 C.F.R. §36.504(d). Attorneys' fees, litigation expenses, and costs in judicial or administrative proceedings may be awarded at the discretion of the court or agency to prevailing parties, except where that party is the United States. 42 U.S.C. §12205; 36 C.F.R. §36.505.

Individual complainants are not entitled to monetary damages under Title III. Monetary relief is possible in instances where the Attorney General intervenes, but ordinarily an individual would be limited to injunctive relief and attorneys' fees and costs. This may be an inadequate incentive for individual complainants to challenge the failure to comply with ADA accessibility requirements.

While a private litigant whose claim does not merit Attorney General intervention seemingly may be limited to equitable relief, Title III of the ADA may, in appropriate cases, indirectly be the basis for damage awards in common-law tort actions. If such a theory is to be allowed, it will become necessary to prove the elements of the applicable tort, such as negligence. Particularly with respect to

physical facilities existing before the effective date of the ADA, it may be difficult to prove exactly what barriers were to have been removed or what physical modifications made in order to demonstrate a duty and a breach thereof. Unlike the kind of situation occurring in the *Morgan* case, *infra*, it is likely that many situations may prove too vague for courts to identify a clear standard.

Plaintiffs have begun to use tort theories in claims involving ADA issues. The cases use ADA standards for architectural accessibility to establish a duty of care as an element of a common law negligence action. One of the most interesting of these cases is *Morgan v. Idaho Department of Public Works*, 124 Idaho 568, 862 P.2d 1080 (1993). A totally blind individual who was trying to unload goods onto a hand truck on a loading dock was severely injured when he fell backwards from an area that did not have tactile warning devices, in violation of the state building code. The court upheld the lower court's determination that the state law applied to such areas. In *Swartz v. Huffmaster Alarms Sys., Inc.*, 145 Mich. App. 431, 377 N.W.2d 393 (1985), the plaintiff who had eaten at a restaurant and who had consumed several alcoholic beverages was hit by a car in crossing the road to his own car. He brought an action against the restaurant for violating state disability discrimination laws. His claim was that he had become intoxicated and anxious as a result of drinking and that he was also legally blind. As a result, he claimed that there was a duty to take special steps for his safety. The court found that the plaintiff was not absolutely blind, and the anxiety was not sufficient to impose a special duty. This case raises the issue as to whether application of ADA standards would have achieved a different result.

A growing body of case law addresses the issue of standing to bring Title III claims for violations of access requirements. With varying results, courts have considered factors such as proximity of the location to the residence, previous patronage, and intent to return. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §6:17 (2012 and cumulative supplement) (listing cases).

See also Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?* 75 OHIO STATE L.J. 1263 (2014); Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers,* 53 WILLIAM & MARY L. REV. 1287 (2012); Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006). One circuit court has established factors for determining when litigation is frivolous or harassing and which may justify limited prohibitions against filing additional lawsuits. In *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008), the court noted that a finding of frivolous, harassing litigation was supported by: 1) numerous claims with false or exaggerated allegations of injuries; 2) the use of coercive letters intimidating the recipients into making cash settlements; and 3) limited occasions on which suits were tried instead of settled. The court determined in a later deliberation of that case that the plaintiff was a vexatious litigant because he filed identical claims at different businesses. The court required a prefiling order for future Title III cases. The dissent in the case was concerned about the extreme remedy and its impact on access to justice. Some courts have addressed the availability of attorneys' fees to defendants where claims are frivolous.

[2] Air Carrier Access Act

Courts have addressed a number of cases involving plaintiffs with disabilities under the ACAA. These cases have involved issues of boarding assistance and seat selection among others. Whether there is a private right of action and the remedies under the ACAA are also addressed. There is not yet clear guidance on all of these issues resulting from these decisions. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §8.2 (2012 and cumulative supplement)).

As the *Tallarico* decision indicates, at least some courts have permitted private actions to enforce the ACA as well as recognizing the availability of monetary damages. The regulations under the ACAA provide for compliance procedures, including a complaint resolution mechanism, but they do

not really address the issues of private right of action and remedies. 14 C.F.R. §382.65. It is not surprising, therefore, that the courts have reached inconsistent results in deciding these issues. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §8.02, note 24 (2012 and cumulative supplement).

[3] Telecommunications Enforcement

The Telecommunications for the Disabled Act of 1982, 47 U.S.C. §396 and Television Decoder Communications Circuitry Act of 1990, 47 U.S.C. §§154, 302, 303, 304, 307 both contemplate administrative agency enforcement. An individual believing that either of these statutes had been violated would complain to the Federal Communications Commission or the Department of Justice. The statutes are silent about private rights of action and individual remedies.

In *Gilstrap v. United Airlines, Inc*., 709 F.3d 995 (9th Cir. 2013), the court held that "the ACAA [Air Carrier Access Act] and its implementing regulations preempt state and territorial *standards of care* with respect to the circumstances under which airlines must provide assistance to passengers with disabilities in moving through the airport. The ACAA does not, however, preempt any state *remedies* that may be available when airlines violate those standards. For instance—but only insofar as state law allows it—tort plaintiffs may incorporate the ACAA regulations as describing the duty element of negligence." The court also held that "the ACAA and its implementing regulations do not preempt state-law personal-injury claims involving *how* airline agents interact with passengers with disabilities who request assistance in moving through the airport."

I. Summary

Until the 1990 enactment of the Americans with Disabilities Act, the disability discrimination protections found under special education statutes and Section 504 of the Rehabilitation Act made it challenging for the one fifth of the population with disabilities to use and access much of the daily experience that others had. This included restaurants, shopping centers, movie theaters, and hotels. Before 1990, the state and local laws addressing disability issues in such places included specific coverage regarding architectural barriers and even some basic nondiscrimination requirements. These piecemeal laws, however, were woefully inadequate to ensuring access and participation. One of the primary inadequacies was ineffective enforcement.

While the Rehabilitation Act began to ensure that many private programs (such as higher education and health care programs) provided greater access, full participation in society was far from a reality.

When the ADA specifically mandated both nondiscrimination and physical facility design to provide for participation in a wide array of places and programs, the ability to participate changed dramatically. The ADA took many of the unresolved issues from case interpretation of the Rehabilitation Act and included them in the statutory language itself. Several sets of very detailed regulations on a broad array of issues have further spelled out protections.

Public accommodations issues have rarely been addressed by the Supreme Court. Only three Supreme Court decisions have focused on these issues. All three decisions focused on whether certain types of programs are Title III entities. These are the 2001 *PGA Tour Inc. v. Casey Martin* decision finding that professional golf tournament is a Title III program, the 2005 *Spector v. Norwegian Cruise Line* decision determining that certain cruise lines with substantial American ties are subject to Title III of the ADA, and the 1986 *United States Department of Transportation v. Paralyzed Veterans of America* decision, finding that airlines are not recipients of federal financial assistance (resulting in the passage of the 1986 Air Carrier Access Act that provides for specific application to the airlines themselves).

The lower courts, however, have addressed a significant number of issues, some of which indicate

areas of substantial agreement and others that do not. Issues such as application to websites and policies regarding the presence of animals as accommodations are frequently addressed. The issue of standing to challenge architectural barrier deficiencies has been the subject of many cases with a developing body of case law. Courts have also given attention to issues of movie theaters and public performance and sports events.

Some federal regulations have been promulgated in response to issues raised in litigation (animal accommodations for example), while others continue to need more clarity and guidance (technology). Rarely does the general topic of public accommodations raise the issue of whether the individual has a disability or is otherwise qualified, although it may become more of an issue with respect to animal policies. Individuals with allergies, asthma, and chemical sensitivities are starting to raise new questions about environmental issues, so it is possible that the definition of disability may become an issue for individuals with these conditions.

Different issues are likely to be addressed for different types of disabilities. For those with mobility and sensory impairments, architectural and design features are most important. Individuals with mobility impairments benefit from the development of technology. They can now shop for and access masses of information from home. That same technology, however, can be a significant barrier for those with visual or hearing impairments. Access to public accommodations is not a primary focus for those with mental health impairments (other than in the context of housing, education, and health care, which are treated separately in other chapters).

It is clear that the 1990 passage of the ADA made an enormous difference in the lives of individuals with disabilities in accessing public places. It is unlikely that there will be a significant statutory amendment to these requirements. It is probable instead that courts and regulatory agencies will be responsible, not for providing new protections, but for interpreting what and how to ensure protection based on the statutes currently in place. As a public policy, this is an area where it is perhaps most apparent that requirements for individuals with disabilities benefit everyone. For example, accessible design benefits those with shopping carts, individuals using delivery carts, rolling luggage users, and those with baby strollers. As more individuals with disabilities have been able to participate in daily life, the public awareness and attitudes about disabilities have changed.

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5. The ABA generally applies to buildings and facilities that are constructed or altered on behalf of the government; leased by the government; financed by certain government grants or loans; or constructed under authority vested by certain statutes. See 42 U.S.C. §§4151–52.

6. See Title III Manual §III-1.2000.A (Supp.1994) (a facility that is "open to out-of-state visitors," as Union Station and all of its amenities, including the Avenue Grand Theater, are, "affects commerce"). The Department of Justice also directly addresses the status of private lessees of government property in its Title III Manual:

> If the owner of a building is not covered by the ADA, is it possible for a private tenant to still have title III responsibility?
>
> Yes. The fact that a landlord in a particular case is not covered by the ADA does not necessarily negate title III's coverage of private entities that lease or operate places of public accommodation within the facility.
>
> ILLUSTRATION: A Federal Executive agency owns a building in which several spaces are rented to retail stores. Although Federal executive agencies are not covered by the ADA, the private entities that rent and operate the retail stores, which are places of public accommodation, are covered by title III.

Title III Manual §III-1.2000.B (Supp.1994).

7. The terms "curb ramps" and "curb cuts" are used interchangeably.

8. The regulations define "facility" to include "all or any portions of ... roads, walks, [or] passageways."

9. Like Title II, Title III bears the distinction between existing and new or altered facilities. Congress intended that the provisions of both titles be read consistently.

10. The regulation was promulgated to comply with Section 504 of the Rehabilitation Act of 1973, also the

predecessor to section 202 of the ADA. The regulation is as follows:

Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient [of Federal financial assistance] ... in a manner that affects or could affect the accessibility of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.