

Legal Briefings

Impact of the Supreme Court's ADA Decisions

By Equip for Equality¹

This legal brief examines United States Supreme Court decisions under the Americans with Disabilities Act (ADA) that are still viable after passage of the Americans with Disabilities Amendments Act of 2008 (ADAAA).² While the ADAAA explicitly overruled the Supreme Court decisions in the *Sutton* trilogy³ and *Toyota v. Williams*,⁴ there are many Supreme Court ADA cases that are still good law. This brief analyzes those Supreme Court decisions, along with a selection of lower court decisions applying the Supreme Court's precedent. Please note that employees are sometimes referred to as plaintiffs and companies sometimes referred to as defendants.

Title I of the ADA - Employment

Supreme Court Case: *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (reassignment as a reasonable accommodation)

Robert Barnett worked in a cargo handling position for U.S. Airways. After a back injury, Barnett invoked his seniority rights and transferred into a less physically demanding position in the mailroom. Barnett learned that other employees with more seniority were planning to bid on this position. As a reasonable accommodation under the ADA, Barnett asked U.S. Airways to make an exception to the seniority system so that he could retain his mailroom job. U.S. Airways denied his request and Barnett lost his job when he was bumped by an employee with more seniority. Barnett filed suit under the ADA, and U.S. Airways defended itself by arguing that the ADA did not trump its seniority system. The Supreme Court noted the importance of seniority in employee-

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² P.L. 110-325

³ *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999), were decided at the same time by the Supreme Court and are referred to collectively as the "Sutton trilogy."

⁴ *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

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management relations and held that, ordinarily, if an employer shows that an employee's requested accommodation conflicts with seniority rules, the requested accommodation constitutes an undue burden and is not reasonable. However, the employee may present evidence of special circumstances demonstrating that an exception to a seniority rule is reasonable in a specific case. For instance, if an employer retained the right to change the seniority system unilaterally and frequently exercised that right, there would be a stronger argument that making an exception for an employee with a disability would not be an undue burden. An employee might also prevail by showing that the seniority system already contains exceptions and one further exception is unlikely to create an undue burden for the employer. Implicit in the decision is a recognition that, absent an undue burden, transfer to an open position may be a reasonable accommodation: "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal" and thus the "simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.' "

Subsequent Interpretations by Lower Courts:

- ***EEOC v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016)**

Plaintiff was working as a nurse in a psychiatric ward when she developed spinal stenosis and arthritis that required use of a cane. Defendant determined that plaintiff could no longer work in her position, as her cane could be used as a weapon by patients. Defendant gave her 30 days to find a new position in the hospital. She was instructed to apply -- and compete with other applicants -- for open positions in which she was interested. When plaintiff failed to obtain a new position, she was terminated. The EEOC argued that defendant violated the ADA because it required plaintiff to compete for a vacant position rather than simply assigning her to a vacant position for which she was qualified. The Eleventh Circuit rejected the EEOC's position and held that the ADA does not mandate reassignment without competition. In a broad reading of *Barnett*, the Eleventh Circuit noted that while "[t]his case does not involve a seniority system or a civil service system, but a best-qualified applicant policy ... *Barnett's* framework is instructive." To require "reassignment in violation of an employer's best qualified hiring or transfer policy is not reasonable 'in the run of cases.'" The court opined that "[p]assing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance."

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

United Airlines maintained a written policy that allowed for reassignment of disabled employees that allowed for a transfer to a vacant position, but only where their qualifications were equal to or greater than those of other applicants. The EEOC challenged this policy as in violation of the ADA. The district court dismissed the complaint on the merits. The Seventh Circuit reversed, holding that *Barnett* recognized that preferences are sometimes necessary to comply with the ADA. Absent undue hardship (such as a strict seniority system), reassignment to a vacate position without the necessity of competing with other applicant is reasonable. The Seventh Circuit remanded the case to the district court, directing the court to “first consider (under *Barnett* step one) if mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation ... and, [a]ssuming that the district court finds that mandatory reassignment is ordinarily reasonable, the district must then determine (under *Barnett* step two) if there are fact-specific considerations particular to United's employment system that would create an undue hardship and render mandatory reassignment unreasonable.” The court noted that its adoption of the mandatory reassignment rule put the circuit in line with the Tenth and D.C. Circuits.

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

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

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For these reasons, the court found that the exceptions recognized in *Barnett* were applicable and found for the employee.

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

Plaintiff asked defendant to transfer her to another work site as a reasonable accommodation. Defendant denied plaintiff's request because it conflicted with defendant's neutral policy prohibiting employees from transferring positions within six months of a disciplinary action. The district court granted summary judgment to defendant, and the Ninth Circuit affirmed. Relying on *Barnett*, the Ninth Circuit found that, because plaintiff's transfer would violate defendant's neutral policy, it was not a reasonable accommodation unless plaintiff produced evidence of special circumstances. In this case, plaintiff failed to present such evidence.

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

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

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

Plaintiff was a truck driver who had worked for the defendant for 18 years. He developed back problems, necessitating a 60-pound lifting restriction. He requested reassignment to a route that did not require heavy lifting. The employer denied reassignment on the grounds that reassignment would violate its seniority system, as a more senior employee could later bid for the new position. In upholding the jury verdict for the plaintiff, the court disagreed with the defendant's logic, stating that there was only a "potential violation of the seniority system." As the employee had the requisite seniority for the position, and the employer could remove him later if a more senior employee requested the position, reassignment should have been available.

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

As the cases above illustrate, there is a conflict between the circuits as to whether reassignment as a reasonable accommodation means that employee is directly placed in the position if qualified (even if there are better qualified candidates) or whether the employee merely gets the right to compete for the position. The EEOC contends that the employee does not need to be the best qualified individual for the position and should not have to compete for it.⁵ "Reassignment means that the employee gets the vacant position if s/he is qualified for it." Otherwise, "reassignment would be of little value and would not be implemented as Congress intended."⁶

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

Joel Hernandez, a Raytheon employee, was forced to resign after testing positive for cocaine, as drug use violated company policy. More than two years later, after he had gone through rehabilitation and had stopped using drugs, Hernandez reapplied for a position with Raytheon. Raytheon did not hire him, citing its policy not to rehire former employees who were terminated for workplace misconduct. Hernandez sued, alleging discrimination under the ADA. Specifically, Hernandez alleged disparate treatment by his employer on the basis of his record of drug addiction, and/or on the basis of being regarded as having a drug addiction. In response to his employer's motion for summary judgment, Hernandez additionally argued that, even if his employer's no-rehire policy was facially neutral, it had a disparate impact on people with disabilities, and therefore still violated the ADA. The Supreme Court, careful not to conflate disparate treatment and disparate impact, explained that, with regard to disparate treatment, the employer provided a neutral no-rehire policy that applied to all former employees terminated for workplace misconduct, not just former employees with disabilities. This policy constituted a legitimate, nondiscriminatory reason for its decision not to rehire Hernandez. With regard to the disparate impact of the facially neutral policy, Hernandez did not timely raise this argument, as it was first raised on appeal. Because the Court of Appeals conflated the disparate treatment and impact issues, the Supreme Court vacated its judgment and remanded the case for proper consideration of the disparate treatment issue.

⁵ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (October 22, 2002), www.eeoc.gov/policy/docs/accommodation.html.

⁶ *Id.*

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Subsequent Interpretations by Lower Courts:

- ***Lopreato v. Select Specialty Hosp.–Northern Kentucky, LLC*, 640 Fed. Appx. 438 (6th Cir. 2016)**

Lopreato involved two nurses who claimed that a hospital discriminated against them because of past chemical dependency. Plaintiffs participated in a drug recovery program after stealing medication and were eventually permitted to regain their nursing licenses with restrictions. The nurses disclosed the restrictions, but not the reason for them, to a potential employer, defendant hospital. When the hospital failed to hire them, they filed suit under the ADA. The district court granted summary judgment for the employer, concluding that the employer's decision not to hire the nurses was motivated by a neutral company policy not to hire nurses with licensing restrictions, not by discrimination based on disability. The Court of Appeals affirmed, relying heavily on *Raytheon v. Hernandez*. The court noted the strong similarity between Raytheon's no re-hire policy and the hospital's policy of not hiring nurses who have restrictions on their licenses. The court concluded that "an employer's decision to reject an applicant because the applicant did not have a neutral characteristic which the employer requires of all employees is legitimate and nondiscriminatory, even if the rejected lacks the desired characteristic because he is disabled." Thus, even though the nurses had restrictions because of their disability of chemical dependency, the decision not to hire them was neutral and nondiscriminatory. The burden then shifted to the nurses to show by a preponderance of the evidence that the proffered neutral reason was actually a pretext for discrimination. The court found that the nurses did not meet this burden. The court also rejected the argument that the hospital's policy would, in practice, exclude those nurses who have undergone a treatment program from any mainstream employment. The court found that nurses' argument, like the plaintiff's argument in *Hernandez*, was a disparate-impact argument and thus had no relevance to nurses' claim, which was a disparate-treatment claim.

- ***Monaco v. City of Jacksonville*, 51 F.Supp.3d 1251 (M.D. Fla. 2014), *aff'd mem.* 671 Fed.Appx. 737 (11th Cir. 2016)**

A class of employees alleged that their employer, the City of Jacksonville, required them to undergo physical exams and then used the results to exclude them from the City's pension system. This violated the ADA, as it excluded them from the system based on actual or perceived disabilities. The City responded that people whose physical exams showed pre-existing conditions were not denied entry in the system unless they failed to fill out a waiver of disability benefits for pre-existing conditions. The court, using the analysis from *Raytheon v. Hernandez*, concluded that the essence of plaintiffs' claim was disparate treatment, not disparate impact. Thus plaintiffs were required, through direct and/or circumstantial evidence, to prove that the City intentionally discriminated

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against them – intentionally kept them out of the retirement system because of actual or perceived disabilities. Intent, the court found, could be shown in class actions in part through strong statistical evidence of disparate impact; but this statistical evidence had to be coupled with evidence of intentional discrimination. The court, relying on *Raytheon*, rejected plaintiffs' many efforts to conflate disparate impact and disparate treatment. The court granted summary judgment to the City, holding that the City did not intentionally exclude plaintiffs from the employment system. It offered membership in the system to everyone and at the same cost. It did exclude disability benefits for pre-existing conditions, but this was applied across the board and was not challenged by plaintiffs. The court acknowledged that the waiver process was poorly administered and perhaps unnecessary (since the City Code already excluded pre-existing conditions as a basis for disability benefits), but that there simply was not adequate statistical or anecdotal evidence to infer discriminatory intent on the part of the City.

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

A class of deaf and hard of hearing employees and job applicants who could not pass Department of Transportation (DOT) hearing standards imposed by the employer on all of its package-car drivers sued under the ADA and state law. The trial court found in favor of the plaintiffs and a panel of the 9th Circuit affirmed that decision. However, upon rehearing by all of the 9th Circuit judges, the lower court decision was reversed and sent back to the district court. The federal government required only drivers of trucks in excess of 10,000 pounds to pass the DOT test, but UPS required all of its drivers to pass the DOT test. UPS alleged that "hearing" at a level sufficient to pass the DOT hearing standard was either a stand-alone essential job function or part of the identified essential function of being a "safe driver." Because the district court did not analyze whether plaintiffs are "qualified individuals" capable of performing the "essential function" of safely driving a package car, the case was remanded to the district court for the employees to prove that they were so qualified. Only if they met this burden did the question become whether the qualification standard used by the employer (passing the DOT test) satisfied the business necessity defense. *Bates* cited *Raytheon* for the proposition that the business necessity test applies to disparate treatment and disparate impact claims.

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

Conner involved an age discrimination claim rather than the ADA. In *Conner*, an individual sued State Farm, alleging that it did not hire her due to her age. An industrial psychologist was asked by the plaintiff to review and analyze State Farm's hiring practices, and he determined that applicants over 40 years old were less likely to be selected as agents. State Farm moved to strike this evidence, arguing that, while

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plaintiff's claim alleged disparate treatment, the expert's analysis supported only a claim for disparate impact, and therefore was inadmissible *Raytheon*. The court rejected this argument and denied State Farm's motion, explaining that the expert's analysis took into account State Farm's subjective judgment in its hiring decisions. In accordance with *Raytheon*, discrimination claims based on disparate treatment, unlike claims of disparate impact, focus on the employer's subjective intent.

Supreme Court Case: *Chevron v. Echazabal*, 536 U.S. 73 (2002) (direct threat to self)

In *Chevron v. Echazabal*, plaintiff was offered a job contingent on passing a medical examination. The examination revealed a liver abnormality that was eventually diagnosed as Hepatitis C. The employer's doctors determined that plaintiff's condition would be aggravated by continued exposure to toxins at the employer's refinery. Accordingly, the employer withdrew the employment offer on the basis that plaintiff would pose a direct threat to his own health and safety. Plaintiff sued, alleging discrimination on the basis of his disability in violation of the ADA. The issue was whether the defense of direct threat was limited to a "threat to others," as set forth in the ADA, or if it also included a "threat to self" as defined in the EEOC's Title I Regulations. The Supreme Court held that direct threat included "threat to self." Therefore, the employer's actions were deemed legal under the ADA. The Court emphasized that under the ADA's direct threat analysis, employers will have to rely upon the best available objective medical knowledge and conduct an individualized assessment of the employee's present ability to safely perform the essential functions of the job instead of relying on stereotypes or paternalistic perspectives.

Subsequent Interpretations by Lower Courts:

- ***Lewis v. City of Union City*, 877 F.3d 1000 (11th Cir. 1017)**

Plaintiff, a police officer, had a heart attack. Although she made a full recovery, her doctor felt that she should not use or be in close proximity to taser guns or OC spray, due to a possible negative impact on her heart. Plaintiff requested an accommodation of not being required to use or be in close proximity to taser guns or OC spray, which she felt was reasonable in light of the fact that she was a detective, not a beat officer. In response, the police department put her on involuntary leave until such time as she could come back to work without any restrictions and then fired her when she did not report to work. She sued her employer for discrimination on several bases, including disability. The district court granted the employer's motion for summary judgment. The Court of Appeals reversed, finding that there were issues of material fact. While plaintiff

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did not produce evidence sufficient to show that she in fact had a disability, there was a material issue of fact on whether the employer regarded her as having a disability. Indeed, a jury could conclude that the police department put her on leave and fired her precisely because it regarded her as disabled. There was also an issue of fact as to whether exposure to taser and OC spray was, as the police department argued, an essential function of the job. Finally, there was an issue of fact as to whether plaintiff posed a “direct threat” to herself by virtue of the harm that exposure to taser and OC could cause her. The Court of Appeals, citing *Echazabal*, noted that, if the jury determined that taser and OC exposure were not essential functions of the job, then it would not be necessary for plaintiff to be exposed to them and she would not be a “direct threat.”

- ***Class v. Towson University*, 806 F.3d 236 (4th Cir. 2015)**

In *Class*, the plaintiff was a university football player who collapsed during practice from heat stroke that led to liver failure. The player recovered after extensive surgery and returned to Towson to continue in his position on the team. When the defendant's sports medicine doctor refused to clear the plaintiff because of an “unacceptable risk of serious reinjury or death,” the plaintiff filed suit. The plaintiff alleged that his exclusion from the team violated Title II of the ADA. The court upheld the defendant's decision to deny plaintiff's return to the team because he was a potential threat to himself after heatstroke and liver failure. The court surveyed direct threat cases, including *Echazabal*, and reaffirmed that a court's analysis of direct threat should look at the medical basis and objective reasonableness of an entity's decision, in light of then-current medical knowledge. Further, the court referred to *Echazabal* as standing for the proposition that the objective standard is crucial to avoiding the paternalism that may arise in direct threat analysis.

- ***Pollard v. Drummond Company, Inc.*, 2015 WL 5306084 (N.D. Ala. 2015)**

Plaintiff was an underground coal miner who was terminated after a company doctor, examining plaintiff for an unrelated injury, expressed concerns about plaintiff's back pain and possible side effects of the medication he took to manage it. After an independent medical evaluation confirmed the company doctor's examination, the defendant terminated the plaintiff, citing the potential threat to him and others. The court denied summary judgment for the employer, finding that there were genuine issues of material fact as to whether the plaintiff posed a direct threat to his or others' health and safety and whether the company's reliance on the two physicians was sufficient to justify the termination. Citing *Echazabal*, the court noted that direct threat defenses must be based on reasonable medical judgment and upon an individualized assessment of the employee's ability to safely perform the essential functions of the job. An assessment based on the known possible side effects of a medication, as opposed to an individualized inquiry into a patient's present ability to perform his job functions, is

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insufficient. The employee's own doctor and his expert did not concur with the doctors relied upon by the company.

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

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

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

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

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

In January of 1994, while employed by Policy Management, Carolyn Cleveland had a stroke that impaired her concentration, memory, and language skills. Three weeks after her stroke, Cleveland applied for SSDI stating that she was "disabled" and "unable to work." In April of 1994, with her condition improved, she returned to work. She reported this to the Social Security Administration (SSA), which in turn denied her application for

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SSDI. Around this time, Cleveland requested, as a reasonable accommodation, that she receive training and additional time to complete her work. Policy Management denied Cleveland's requests, and in July of 1994, terminated her employment. In September of 1994, Cleveland asked SSA to reconsider its denial, stating: "I was terminated [by Policy Management Systems] due to my condition and I have not been able to work since. I continue to be disabled." She later added that Policy Management terminated her because she "could no longer do the job" in light of her "condition." In November of 1994, SSA denied Cleveland's request for reconsideration, and Cleveland sought an SSA hearing, reiterating: "I am unable to work due to my disability." Eventually SSA awarded Cleveland SSDI benefits. Around the same time, Cleveland filed an ADA lawsuit. In defense of the suit, Policy Management argued that Cleveland's receipt of SSDI benefits automatically estopped her from pursuing an ADA claim because she stated on her SSDI application that she was not qualified.

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

The Court distinguished between legal and factual statements and directed that statements to SSA be taken in their legal context. A representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, "I am disabled for purposes of the Social Security Act." The Court

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distinguished these context-based statements from factual statements, e.g. “I can/cannot raise my arm above my head.” Regarding purely factual inconsistencies, the Court notes on three occasions that it is leaving the law “where [it] found it.”

As applied to Cleveland, the Court opined that Cleveland explained the discrepancy between her statements sufficiently to bypass summary judgment because the statements made to SSA were in a forum that did not consider the impact of reasonable accommodations in the workplace. She also stated that her claims were accurate in the time period in which they were made.⁷

Subsequent Interpretations by Lower Courts:

- ***Equal Employment Opportunity Commission v. Vicksburg Healthcare, L.L.C.*, 663 Fed.Appx. 331 (5th Cir. 2016)**

A nurse tore her rotator cuff and required surgery. When her doctor released her to return to work, he placed lifting restrictions, as she was still recovering from surgery. She was fired for being unable to fully perform the functions of her job. The next day, she applied for temporary disability benefits, stating that she was temporarily totally disabled. The EEOC subsequently filed a complaint in district court, alleging that the termination violated the ADA. The district court granted summary judgment to the defendant, finding that the employee had not satisfactorily explained the inconsistency between her claim of “temporary total disability” in her application for temporary disability benefits and her contention that she was “qualified” to work in her nursing job for purposes of the ADA. The Fifth Circuit reversed, noting that the case was like *Cleveland* in that the employee’s claim that she was temporarily totally disabled for the purposes of private disability benefits was not inconsistent with the claim that she could work if provided a reasonable accommodation.

- ***Boyle v. City of Pell City*, 2016 WL 4585926 (N.D. Ala. 2016)**

Plaintiff was employed as a heavy equipment operator for defendant. After plaintiff sustained an on-the-job injury, the employer accommodated him by placing him in a different position. After plaintiff’s supervisor retired, the new supervisor placed plaintiff in his old position, one that would aggravate his injury. Plaintiff attempted to perform his

⁷ For a further discussion of *Cleveland* issues, please see: Alan Goldstein and Barbara Siegel, *Making the ADA Work for Social Security Disability Beneficiaries: Life After Cleveland v. Policy Management Systems*, Clearinghouse Review: Journal of Poverty Law and Policy, September-October 2007, Volume 41, Numbers 5-6, Pages 317-326, Published by Sargent Shriver National Center on Poverty Law; and Lauren Lowe, *What Employees Say, or What Employers Do: How Post-Cleveland Decisions Continue to Obscure Discrimination*, 62 Vanderbilt Law Review 1245 (2009).

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previous job responsibilities, but after his injury was aggravated, he submitted an application for disability retirement. Plaintiff attached a physician's certification saying that he was totally and permanently incapacitated for further performance of his duty and that there were probably not any reasonable accommodations that could be made for him. He sued for employment discrimination, alleging that he was constructively discharged by the employer's failure to accommodate him. The court granted summary judgment on plaintiff's claim to the defendant, finding that plaintiff had not offered a sufficient explanation for the inconsistencies between his disability benefit applications and his employment discrimination claim. He could not at once be too disabled to work, even with a reasonable accommodation, and qualified to work with a reasonable accommodation.

- ***Amerson v. Clark County*, 995 F.Supp.2d 1155 (D. Nev. 2014)**

Plaintiff suffered an on-the-job injury during a training course required by defendant county to work as a juvenile probation officer. During her recovery, her physician determined that she would be unable to work as a juvenile probation officer in the foreseeable future due to her restrictions. Defendant informed her that if she could not return to work by June 19, they would institute medical separation proceedings. She was eventually medically separated and filed a grievance challenging the separation. The grievance resulted in a settlement where she acknowledged that her disability could not be accommodated. The defendant relied on her acknowledgement in the settlement as grounds to refute her ADA disability discrimination claim. The court agreed, distinguishing plaintiff's case from *Cleveland*, and holding that plaintiff could not offer an explanation sufficient to warrant a reasonable jury concluding that she could perform the essential functions of her job, with or without reasonable accommodation. The court also held that, unlike the differences between SSDI and the ADA in *Cleveland*, where SSDI does not take into account reasonable accommodations and the ADA does, the state statute at issue in plaintiff's case and the ADA were similar in that both took into account reasonable accommodations. Thus, when plaintiff stipulated that her disability could not be accommodated under the state statute, that stipulation also defeated her ADA claim.

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

A salesman sued his former employer for discrimination under Title I of the ADA. The salesman was employed from 1996 to 2004. In 2001, he began experiencing seizure-like symptoms, and after drooling at a sales meeting, his employer sent him home, ordered him to get a medical evaluation and told him not to contact any customers. The fitness-for-duty evaluation found plaintiff fit and he returned to work. He was later diagnosed with a complex partial seizure disorder and epilepsy. At this time, he applied for, and received, private long-term disability benefits. He worked from home for a while

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and then was terminated. Following his termination, he applied for SSDI. He brought suit under the ADA, asserting that he was terminated because he was “regarded as” having a disability. The jury awarded him \$410,000 in back pay and \$65,000 in damages. The employer appealed, arguing that the employee's “regarded as” claim failed because he was in fact disabled under the ADA and his disability rendered him unable to perform the essential functions of his job. The Eighth Circuit affirmed jury decision. The Eighth Circuit rejected the employer's argument that the receipt of private and SSDI benefits demonstrated that he had an actual ADA disability, noting that the definition of “disabled” used by the private insurer and the Social Security Administration differed from that of the ADA.

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

The Seventh Circuit upheld the lower court's grant of summary judgment for the defendant. Plaintiff, a former police sergeant with chronic obstructive pulmonary disease, was placed on leave until he received a full clearance that he could perform all the normal duties expected of a police officer. The plaintiff later applied for pension benefits saying he was permanently disabled from police duties. The court ruled that plaintiff was estopped from bringing an employment discrimination claim because he failed to offer a sufficient explanation for the contradictions between saying in his application for benefits that he was permanently disabled for police duties and alleging in his ADA lawsuit that he was qualified for police duties.

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

The district court found that plaintiff was not a qualified individual under the ADA. Prior to this lawsuit, plaintiff filed for both long-term disability benefits and SSDI, representing that she was unable to work. The district court relied on her representation and concluded that she was unqualified for her position, negating an essential element of her ADA claim. On appeal, plaintiff argued that her statement did not preclude her suit because her prior statement did not consider whether she could work with a reasonable accommodation. The Third Circuit affirmed. The court explained that the plaintiff's only accommodation request was for an extended unpaid leave and even if she were granted this accommodation, it would not render her qualified to perform the job's essential functions.

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

Caeser Wright worked as a longshoreman, and was subject to a collective bargaining agreement between his union and an association of stevedore companies. When the stevedore companies found out that Wright had settled a claim for permanent disability,

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

Subsequent Interpretations by Lower Courts:

- ***Montgomery v. Compass Airlines, LLC*, 98 F.Supp.3d 1012 (D. Minn. 2015)**

When plaintiff applied for the position of flight attendant with defendant, she signed an agreement agreeing to submit any legal claims or disputes to an arbitrator. Plaintiff began suffering migraine headaches and sinus infections that caused her to miss work. Plaintiff requested intermittent FMLA to avoid penalties under defendant's absenteeism policy but was repeatedly denied FMLA. Plaintiff was then terminated for allegedly submitting fraudulent FMLA documents. Plaintiff filed this case alleging that defendant had violated the provisions of FMLA and defendant countered with a motion for summary judgment arguing that the CBA required plaintiff to arbitrate her FMLA claim. The court agreed. The court found that the language of the CBA, which explicitly mentioned the FMLA, met *Wright's* requirement that waiver of the right to litigate a statutorily protected right in favor of arbitration be "clear and unmistakable." The fact that the FMLA was mentioned in a different section than the commitment to arbitrate did not persuade the court otherwise. The court thus dismissed plaintiff's complaint.

- ***Lawrence v. Sol G. Atlas Realty Co., Inc.*, 841 F.3d 81 (2d Cir. 2016)**

Plaintiff was employed as a porter for defendant property management company. After a series of disputes with defendant, plaintiff filed suit alleging violations of Title VII, 42 USC 1981, and numerous state laws. The magistrate issued a reported and recommendation, adopted by the district court, finding that the plaintiff's CBA compelled arbitration for all his claims. The Second Circuit reversed, relying on *Wright*, holding that the CBA did not clearly and unmistakably waive plaintiff's rights to litigate his claims in a judicial form. The Second Circuit affirmed the strong language of *Wright* that the right to litigate statutory claims is waived only if the wording of waiver is "not susceptible to a contrary reading." The Second Circuit also surveyed holdings in its sister circuits, which affirmed the reading of the *Wright* "clear and unmistakable" standard to require "specific

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references in the CBA either to the statutes in question or to statutory causes of action generally.”

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

In *O'Brien*, police officers sued their police department and town in federal court, alleging that the method of determining overtime pay violated the Fair Labor Standards Act (FLSA). The officers were members of a union that had a collective bargaining agreement with the town, which included an arbitration clause. The district court granted summary judgment for the town and police department, reasoning that the officers' claims concerned the terms of the contract but were “gussied up as a statutory claim” to invoke *Wright* and avoid arbitration. The First Circuit reversed, explaining that even though the facts giving rise to the officers' claims concerned both the terms of the contract and the statute, the statutory claim did not “merge” into a contractual claim. Therefore, under *Wright*, a “clear and unmistakable” waiver of a judicial forum was necessary to bind the officers to arbitration of their FLSA claim. Because no clear and unmistakable waiver was present, summary judgment on this ground was improper.

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

Waffle House involved an employee who entered an arbitration agreement with his employer. The employee was terminated after experiencing a seizure at work. Rather than arbitrating his claim, the employee filed a charge of discrimination with the EEOC, alleging an ADA violation. After an investigation, the EEOC filed an enforcement action against Waffle House in federal court, requesting injunctive relief as well as “victim-specific” relief, such as back pay, reinstatement, compensatory damages, and punitive damages for the former employee. Waffle House motioned to stay the EEOC's suit to compel arbitration, pursuant to its agreement with the former employee. After the district court denied the motion, the Court of Appeals determined that because the EEOC was not a party to the arbitration agreement, and because it has independent statutory authority to bring suit, the EEOC could pursue injunctive relief as this remedy is meant to further the public interest. However, because of federal policy favoring arbitration agreements, the court held that the EEOC could not seek victim-specific relief for the employee's private benefit. The Supreme Court reversed, holding that the EEOC may seek both an injunction and victim-specific relief. When the EEOC files suit on its own, the employee has no independent cause of action, and the EEOC is not representing the employee. The EEOC, as a public agency, may determine that public resources should be used to obtain victim-specific relief. Further, the EEOC cannot be forced to arbitrate when it has not contracted to do so, merely because two other parties have entered a contract following the general rule that, “A contract cannot bind a

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nonparty.” The Court also noted that nothing in the EEOC’s statutory authority limits its ability to seek victim-specific relief.

Subsequent Interpretation by Lower Courts:

- ***Broussard v. First Tower Loan, LLC*, 150 F.Supp.3d 709 (E.D. La. 2015)**

In a case involving sex discrimination and not the ADA, an employee whose contract with his employer included an arbitration agreement filed a charge of sex discrimination with the EEOC. Plaintiff was a transgender man and was terminated after refusing to comply with employers’ female dress code. After receiving his EEOC Notice of Right to Sue, he filed suit and the EEOC intervened as a party. The employer then motioned to stay the proceedings and compel the employee to arbitrate his claims, pursuant to the arbitration agreement. The court first examined whether the EEOC, as a non-signatory to the arbitration agreement, could nonetheless have its proceedings stayed. The court relied on Fifth Circuit case law to find that the agreements with mandatory stay provisions *could* affect non-party litigants. The court then granted the employer’s motion in full and distinguished plaintiff’s case from *Waffle House*, finding that in *Waffle House*, the EEOC filed an enforcement action and the employee was not a party to the case, whereas in this case the plaintiff filed the case and the EEOC intervened. The plaintiff was thus a party to the case. The court thus stayed the proceedings pending the mandatory arbitration.

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

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

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discuss the possible forums in which the employer and employee will resolve the employee's individual claim.

Supreme Court Case: *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)(when is a person an employer vs. an employee?)

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

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

The facts that indicated the physician/shareholder/directors were *not* employees included that they controlled the operation of the clinic, shared in the profits, and were personally liable for malpractice claims. On the other hand, the physician/shareholder/directors received salaries, had to comply with the clinic standards and report to the personnel manager, admitted they were "employees" under ERISA and state worker's compensation laws, and had employment contracts (under

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which they could be terminated). For these reasons, the Court held that further review by the lower court was appropriate and remanded the case.

Subsequent Interpretation by Lower Courts:

- ***Bluestein v. Central Wisconsin Anesthesiology, S.C.*, 769 F.3d 44 (7th Cir. 2014)**

Plaintiff was a partner, shareholder, and member of the board of directors of a medical service corporation. She was terminated and filed suit under Title VII, the ADA, and the Rehabilitation Act alleging gender and disability discrimination. The district court granted summary judgment to defendant, holding that plaintiff was an employer rather than an employee and was ineligible for the protections of the statutes under which she sued. The Seventh Circuit affirmed after a review of the factors set out in *Clackamas*. The plaintiff argued that she was an employee because she had initially joined the medical service corporation as an employee, her W-2 indicated she was an employee, and the contract she signed as an employee was still in effect. The Court concluded that: "Taking all six factors as a whole, we conclude that Bluestein was an employer as a matter of law. In sum, she was a full physician-shareholder and board member in a small medical professional corporation. She had an equal right to vote on all matters coming before the board, shared equally in the firm's profits and liabilities, and participated in decisions to hire and fire employees. She even voted on her own termination. Although she was subject to general workplace policies regarding her hours, vacation, scheduling and patient assignments, all the physician-shareholders were subject to the same policies, and all had an equal right to influence those policies. She reported to no one and the details of her work as an anesthesiologist were not supervised or controlled by anyone at the firm."

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

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

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

Supreme Court Case: *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (interplay of the ADA and the 11th Amendment)

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

In defending against these claims, the State argued that the ADA exceeded Congress' authority to abrogate Eleventh Amendment immunity. The Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The district court found that there was immunity and granted summary judgment to the State. The Eleventh Circuit Court of Appeals reversed the decision. When it reached the Supreme Court, the Court held that the Eleventh Amendment bars suits in federal court by state employees for money damages under Title I of the ADA. The Court found that the ADA's legislative record failed to show a history and pattern of irrational employment discrimination by the states against people with disabilities. Such a history is necessary to justify a waiver of sovereign immunity. However, the Court held that the Eleventh Amendment does not bar injunctive relief and that state employees are permitted to bring suits against the state seeking injunctive (non-monetary) relief such as reasonable accommodation.

Justice Breyer wrote a dissent, which Justices Stevens, Souter and Ginsburg joined. The dissent described the vast legislative record about the mass, society-wide discrimination against individuals with disabilities, which the majority had discounted as not specific to state employment practices. The dissent noted that there is no reason to

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believe that state governments are insulated from this type of discriminatory practice. The dissent also noted that there were roughly 300 examples of discrimination by state governments themselves in the legislative record, so it failed to see how this evidence “fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which... legislation must be based.”

Subsequent Interpretation by Lower Courts:

- ***Emery v. Michigan Department of Civil Rights*, 2016 WL 1090429 (E.D. Mich. 2016)**

Plaintiff brought claims against her former employer, the Michigan Department of Civil Rights, for failing to accommodate her disability, retaliating against her for filing an EEOC claim, and discriminating against her on the basis of age and race. The Department raised the Eleventh Amendment's sovereign immunity as a defense and sought dismissal of the plaintiff's claims. The court noted that plaintiff's first claim, failure to accommodate, fell squarely within *Garrett's* holding that Congress did not validly abrogate the states' sovereign immunity with respect to money damages under Title I of the ADA. The court also noted that neither the Supreme Court nor the Sixth Circuit had determined whether the Eleventh Amendment's immunity bars claims of retaliation under Title V of the ADA. Noting this absence of precedent, the court ultimately concurred with the Ninth Circuit and found that *Garrett* applies with “equal force to bar both Title I and Title V claims asserted by Plaintiff against [the Department].” The court concluded that the plaintiff could proceed against her two supervisors, in their official capacities, to the extent that she was seeking non-monetary relief from them.

Supreme Court Case: *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, (2003) (interplay of the FMLA and the 11th Amendment)

William Hibbs, an employee at the Nevada Department of Human Resources, sought unpaid leave under the Family and Medical Leave Act (FMLA) to care for his ailing wife. The Department granted Hibbs' request for 12 weeks of leave, the amount statutorily allotted. Once Hibbs' leave expired, the State informed Hibbs of his return to work date. Hibbs failed to report to work on that date, and the State terminated his employment. Hibbs sued the State for equitable and money damages under the FMLA. The district court granted summary judgment to the State, finding the Eleventh Amendment barred FMLA claims under *Garrett*. The Ninth Circuit reversed this finding. The Supreme Court affirmed the Circuit Court's decision, holding that state employees may recover money damages in federal court for a State's failure to comply with the FMLA. The Court explained that Congress abrogated states' Eleventh Amendment immunity because it clearly and unmistakably expressed its intention to do so. The Court also found that

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

Title II of the ADA

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

Olmstead involved two women with intellectual disability and mental illness who were patients at a state-operated hospital in Georgia. Although state treatment professionals for both women had deemed them appropriate for community-based placements, both remained in institutions. They filed suit under Title II of the ADA alleging that the State had violated the ADA's integration mandate. The integration mandate was based on Title II Regulations promulgated by the Department of Justice. These regulations provided that state and local governments must provide their services to people with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, and make reasonable modifications in the services it provides unless

those modifications would result in a fundamental alteration. The Supreme Court held that the unwarranted institutionalization of people with disabilities is a form of discrimination that is actionable under the ADA. The Court ruled that the ADA requires states to serve people with disabilities in community settings, rather than in segregated institutions, when three factors are present:

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

The Court also held that a state can meet its obligations by creating a comprehensive, effectively working plan for evaluating and placing people with disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace and that is not

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controlled by the state's endeavors to keep its institutions fully populated. The Court noted that a state can rely on the fundamental-alteration defense by showing that in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the state's responsibility for the care and treatment of a large and diverse population of persons with mental disabilities.

Subsequent Interpretation by Lower Courts:

a. Segregated Workshops and Day Programs

Although *Olmstead* did not specifically involve segregated workshops and day programs, the integration mandate can be applied to those settings.

- ***Lane v. Brown* 166 F.Supp.3d 1180 (D. Ore. 2016)**

In a class action challenging Oregon's use of segregated workshops for people with developmental disabilities, the court approved a settlement ending new entries to sheltered workshops. The State will also increase services designed to achieve integrated employment, including providing employment services to 7,000 people with developmental disabilities.

- ***U.S. v. Rhode Island*, 1:14-cv-00175-(D.R.I. 2014)**

The United States and Rhode Island recently entered into the nation's first state-wide settlement agreement based on the unnecessary segregation of people with disabilities in workshops and facility-based day programs. The settlement resolved the Department of Justice, Civil Rights Division's finding that the State's day activity service system

over-relies on segregated settings and excludes individuals with disabilities from integrated alternatives. The settlement will provide relief to over 3,000 individuals with intellectual and developmental disabilities over ten years. These individuals include students receiving transition services, individuals in facility-based programs, and individuals in sheltered workshops. The relief includes State-supported employment placements, services to support a 40-hour work week, and employment with competitive wages.

b. At Risk of Institutionalization

Although *Olmstead* involved plaintiffs in institutions, the decision has also been applied to people who are "at risk of institutionalization."

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- ***Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016)**

Plaintiffs were a class of Medicaid recipients who qualified for New York's Medicaid plan on the basis of their disabilities. Plaintiffs had a genuine need for orthopedic footwear and/or compression stockings to help them maintain mobility and avoid complications. In 2011, New York amended its list of qualifying conditions and plaintiffs lost funding for orthopedic footwear and compression stockings. The plaintiffs did not receive written notice of the changes in coverage and learned of the changes when they attempted to fulfill their prescriptions. Both parties filed motions for summary judgment on all counts and the district court granted plaintiffs summary judgment on, among other things, their claims of disability discrimination under the ADA and Rehabilitation Act. The Second Circuit affirmed the district court's holding, finding that cutting funding for medically necessary orthopedic footwear and compression stockings violated *Olmstead's* integration mandate and put plaintiffs at a substantial risk of requiring institutionalized care.

- ***Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016)**

Plaintiffs, who were people with developmental disabilities, brought an action against the Indiana Family and Social Services Administration, challenging changes to their Medicaid Waiver services. Plaintiffs' funding for services was significantly reduced. They argued that this reduction violated the integration mandate of the ADA because it put them at risk for institutionalization and only allowed them 10 to 12 hours of community integrated services per week. The district court granted summary judgment to defendant. The Seventh Circuit reversed and remanded, holding that changes in the waiver program may violate the ADA: "The state designs, applies for, develops policies regarding, and executes its waiver programs. If those programs in practice allow persons with disabilities to leave their homes only 12 hours each week, cooping them up the rest of the time, or render them at serious risk of institutionalization, then those programs violate the integration mandate unless the state can show that changing them would require a fundamental alteration of its programs for the disabled."

c. Comprehensive Effectively Working Plan

A state may be deemed to have met the integration mandate if it has "a comprehensive effectively working plan."

- ***Murphy by Murphy v. Minnesota Department of Human Services*, 2017 WL 2198133 (D. Minn. 2017)**

Each of the plaintiffs was an individual with a physical, developmental, or cognitive disability, who lived in a facility, and had requested individualized housing services to integrate into the community. Plaintiffs claimed, among other things, that the State

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violated the ADA and Section 504 of the Rehabilitation Act. The defendants countered that the relief plaintiffs were seeking would require a fundamental alteration to the State's Medicaid program. The court held that a State could successfully assert a fundamental alteration defense to an integration mandate claim if it could demonstrate that it had a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace." The court sided with the plaintiffs on defendants' motion to dismiss, concluding that it would be "premature to resolve Defendants' fundamental alteration defense in their favor at the pleading stage."

- ***Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016)**

Plaintiffs, who were people with developmental disabilities, brought an action against the Indiana Family and Social Services Administration, challenging changes to their Medicaid Waiver services. Plaintiffs' funding for services was significantly reduced. They argued that this reduction violated the integration mandate of the ADA because it put them at risk for institutionalization and only allowed them 10 to 12 hours of community integrated services per week. The district court granted summary judgment to defendant. The State asserted as a defense that it complied with *Olmstead's* mandate that it have a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings." The plaintiffs, however, produced evidence to show that the "plan" was undermining, not promoting, community integration. The Seventh Circuit held that a question of fact remained on this issue, reversed the district court's grant of summary judgment, and remanded the case back to the district court.

d. Fundamental Alteration

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

- ***Fortier v. New Mexico Human Services Department*, 2017 WL 3017167 (D.N.M. 2017)**

Plaintiffs were the adoptive parent of a child with fetal alcohol spectrum disorder who had significant deficits in cognitive function, adaptive skills and behavior. The defendant limited the availability of services through the Developmental Disability ("DD") waiver to individuals who have "a developmental disability limited to [intellectual disability], or a specific related condition." The defendants denied plaintiffs' application for the DD waiver after finding that their child did not fit in the waiver's definitions. The plaintiffs argued that the defendants' regulations impermissibly and arbitrarily narrow the

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definition of “related condition” in a manner contrary to federal law that resulted in unlawful discrimination. The defendants argued that plaintiffs failed to state a claim because plaintiffs’ child is not an “otherwise qualified” individual for the waiver program, an argument that the court rejected. The court noted that if this were the proper test, a state could always defeat an ADA integration case by simply developing criteria that excluded certain disabled people. The court ultimately denied the defendants’ motion to dismiss because the defendants did not address the possibility of modification to the DD waiver program or argue that the expansion of the waiver would be a fundamental alteration.

- ***A.H.R. v. Washington State Health Care Authority*, 2016 WL 98513 (W.D. Wash. 2016)**

A.H.R. involved a group of plaintiffs who, because of their complex medical needs, required skilled nursing services around the clock. Defendant was the state health care authority responsible for administering the state’s Medicaid program. The plaintiffs were entitled to, but did not receive, in-home, private duty nursing services for at least 16 hours per day. The defendants alleged that the reason plaintiffs did not receive the services was due to the State’s inability to recruit qualified nurses to work for the Medicaid pay rates. Plaintiffs filed suit alleging, in part, that the defendant had violated Title II of the ADA by not providing services in the most integrated setting appropriate to the beneficiaries’ needs. The defendants raised a number of defenses, including one that changing their existing program would constitute a fundamental alteration. The defendants pointed to the efforts made to secure the required nurses and argued that granting a preliminary injunction for services would constitute a fundamental alteration to the program. The court rejected this argument and granted the preliminary injunction, stating that “budgetary concerns alone . . . do not sustain a fundamental alteration defense.” The court also cited the Tenth Circuit’s holding in *Fisher v. Oklahoma Health Care Authority* that “if every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA’s integration mandate would be hollow indeed.”

- ***Stogsdill v. South Carolina Dept. of Health and Human Services*, 763 S.E.2d 638 (S.C. Ct. App. 2014)**

In *Stogsdill*, plaintiff was a Medicaid-eligible man receiving services under the State’s Medicaid waiver program. After the state implemented a renewed waiver, which included a cap or limit on some services and excluded others, the plaintiff’s services were reduced and his occupational and speech therapy were discontinued. Plaintiff appealed through the administrative process, and the administrative law judge affirmed the reduction in services. On appeal, the plaintiff argued that the administrative law judge erred in concluding that the State met its burden set forth in *Olmstead* of proving an accommodation to his needed services would force the State to fundamentally alter

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the nature of its program. The court agreed, finding that there was no argument other than “general budgetary reduction and financial constraints as the basis for [the defendant’s] fundamental alteration defense.” The court remanded the decision to the administrative law judge for an assessment of required hours and services, without reference to the cap in the waiver program.

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

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

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

Plaintiffs were a class of individuals hospitalized in a state psychiatric hospital. Plaintiffs challenged the State’s compliance with the court mandate to “develop a plan for future de-institutionalization of qualified disabled persons that commits it to action in a manner for which it can be held accountable by the courts.” Plaintiffs argued that the State failed to provide “concrete, measurable benchmarks and a reasonable timeline for them to ascertain when, if ever, they will be discharged to appropriate community services.” In contrast, the State argued that all it had to do was “demonstrate ‘a commitment to take all reasonable steps to continue [its past] progress’” to satisfy the fundamental alteration defense. The court interpreted *Olmstead* “to mean that a comprehensive working plan is a necessary component of a successful ‘fundamental alteration’ defense.” In this case, the State’s efforts were insufficient to demonstrate “a reasonably specific and measurable commitment to de-institutionalization for which DPW may be held accountable.” The court then provided specifics, stating that, at a bare minimum, a comprehensive, effectively working plan should: “specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration

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required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.”

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

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

Supreme Court Case: *State of Tennessee v. Lane*, 541 U.S. 509 (2004)(access to courts and other government services)

Plaintiffs, two Tennessee residents with paraplegia, were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators. One of the plaintiffs, Beverly Jones, sought access to the courtroom to perform her work as a court reporter. The other plaintiff, George Lane, was unable to attend a criminal proceeding being held in an inaccessible second-floor courtroom. The State of Tennessee arrested him for failure to appear when he refused to crawl or be carried up the steps. Lane and Jones filed suit under Title II of the ADA to challenge the State's failure to hold proceedings in accessible courthouses. In response to the ADA suit, the State of Tennessee argued that it is immune from suits under Title II of the ADA due to the 11th Amendment. The plaintiffs argued that, at the very least, the Supreme Court's decision in *Garrett*, stating that states are subject to claims for injunctive relief under Title I of the ADA, should be extended to Title II. The plaintiffs also contended that there is a stronger history of discrimination by states under Title II and therefore states should not be immune from suits for money damages.

The Court held that Title II appropriately abrogated state sovereign immunity such that states are subject to lawsuits filed in federal court for money damages under the ADA in cases involving access to the courts. The Court found that, in enacting Title II, Congress relied on the extensive history of discrimination by states in the provision of its programs

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and services for people with disabilities. The Court went on to hold that the remedies set forth by Congress in the ADA were appropriate to address the objective of enforcing access to the courts for people with disabilities, which included money damage. While the Court limited its holding to cases involving access to courts, its analysis documents the history of state-sponsored discrimination against people with disabilities in many different areas, including voting, education, institutionalization, marriage and family rights, prisoners' rights, access to courts, zoning restrictions.

Subsequent Interpretations by Lower Courts:

- ***King v. Marion Circuit Court*, 868 F. 3d 589 (7th Cir. 2017)**

The county subsidized a private dispute resolution program for domestic relations cases involving modest means. Participation in the program could be ordered by the court or requested by a litigant. Plaintiff requested a referral to the dispute resolution program and an ASL interpreter to facilitate his participation. The county denied the request for an ASL interpreter for the program but agreed to provide one if plaintiff continued through court. The plaintiff had to rely on his stepfather to interpret during the dispute resolution program and then sued. The 7th Circuit found for county, finding that there was not a valid abrogation of sovereign immunity. Unlike in *Tennessee v. Lane*, denial of court-annexed mediation services is not a denial of judicial services. The result might have been different result if the dispute resolution had been mandatory.

- ***Prakel v. State of Indiana*, 2015 WL 1455988 (S.D. Ind. 2015)**

Plaintiffs were a man who was deaf and his mother, a criminal defendant. The plaintiff-son was a spectator to his mother's trial and required a qualified sign language interpreter to access the communication in the courtroom. The plaintiff-son attended the trial to lend emotional support and to help better understand the legal situation that his mother was facing. The plaintiffs brought suit alleging violation of Title II of the ADA and Section 504 of the Rehabilitation Act after the defendant failed to provide plaintiff-son an interpreter. The defendant argued, among other things, that it was immune from plaintiffs' suit under the Eleventh Amendment. The defendant attempted to distinguish the plaintiffs' case from *Lane* by arguing that *Lane* does not extend to cases involving mere spectators, as they are not a party or participant in the hearing. The court rejected this argument, noting that the Supreme Court in *Lane* found that "among the 'fundamental rights of access to the courts' that Title II protects is the First Amendment right of access to criminal proceedings . . . by members of the public." The court went on to hold that the defendant is not immune from the claim that plaintiff-son was denied access to the courts.

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- ***A.M. v. New Mexico Department of Health*, 148 F.Supp.3d 1232 (D.N.M. 2015)**

A.M. involved a developmentally disabled individual who brought a Section 1983 claim against the New Mexico Department of Health. The plaintiff argued that the state denied her access to the courts by denying her the opportunity to object to her transfer from a State facility to a private, unlicensed group shelter. The defendant had placed plaintiff and other individuals with disabilities in private, third party shelters without informed consent, the appointment of a guardian or surrogate decision-maker, or the permission of the courts. The court analyzed *Lane* and found that the plaintiff had plausibly alleged that the defendant had violated her right of access to the courts but did not have a clearly established right at the time of violation. The court concluded that because the right was not clearly established, the state official-defendants were entitled to qualified immunity.

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

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

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

Ronald Yeskey was sentenced to 18 to 36 months in a Pennsylvania correctional facility. However, it was recommended that he participate in a Motivational Boot Camp for first-time offenders instead of serving time in the facility. If Yeskey successfully completed this program, he would be eligible for parole after just six months. The State refused Yeskey's admission into the Boot Camp due to his history of hypertension. Yeskey filed suit under the ADA. The issue before the Supreme Court was whether Title II of the ADA applied to inmates in state prisons; the Court found that it did. The Court found it "unmistakably clear" that state prisons fall within the statutory definition of "public entity." The Court rejected the State's contention that prisons fall outside the ADA because prisoners do not "benefit" from prison services or participate in them voluntarily. Perhaps most notably, the Court rejected the State's argument that the

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ADA's finding and purpose did not specifically mention prisons. The Court opined that the inclusion of the word "institutionalization" could include penal institutions, and then held that the ADA can be applied to situations not expressly anticipated by Congress.

Recent Interpretation by Lower Courts:

Wright v. New York State Dept. of Corrections, 831 F. 3d 64 (2d Cir. 2016) An inmate who had a mobility disability brought an action against the Department of Corrections, asserting claims under the ADA and the Rehabilitation Act, alleging that he was denied the right to use a motorized wheelchair while incarcerated. The district court entered summary judgment for the defendant. Relying on *Yeskey*, The Court of Appeals reversed and remanded, holding that there were issues of fact as to whether the mobility assistance program offered by the prison (a manual wheelchair and a mobility aide) provided plaintiff meaningful access to prison services and as to whether allowing plaintiff the use of his motorized wheelchair would unduly burden defendant. In arriving at this conclusion, the court further held the prison's blanket ban on motorized wheelchairs—without an individualized inquiry into the risks of allowing a mobility-impaired inmate to use his or her motorized wheelchair—violates the ADA and the RA.

Supreme Court Case: *United States v. Georgia*, 546 U.S. 151 (2006)(access in state prisons and damages)

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

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

Subsequent Interpretations by Lower Courts:

a. *Prisons*

- ***Ray v. Department of Corrections*, 2016 WL 1212773 (W.D. Okla. 2016)**

Ray involved a state prisoner who alleged that the prison failed to make reasonable accommodations for his age and disabilities, thereby violating the ADA. He alleged that the prison made him travel daily from his housing unit to the medical unit, including in adverse weather conditions, and that he had to wait outside for anywhere from ten to forty minutes to receive his medication. The court undertook the analysis laid out in *Georgia* to determine if the prison had violated the Eighth Amendment, which was incorporated by the Due Process Clause of the Fourteenth Amendment. The court held that the Eighth Amendment, and therefore, the Fourteenth Amendment, was not violated by the prison's conduct. The facts alleged by the prisoner "undoubtedly establish that he was placed in an uncomfortable position from time to time'-do not give rise to a plausible inference of deliberate indifference to a serious and extreme deprivation, as required to state a claim for violation of the Eighth Amendment."

b. *Education*

- ***Atchison v. Board of Regents of the University System of Georgia*, 2014 WL 12013430 (N.D. Ga. 2014)**

Plaintiff, a student at Georgia Tech University, was expelled after being accused of academic misconduct. Plaintiff had learning disabilities and ADHD. Plaintiff sought and was denied readmission. The court held that defendant was immune, finding that, while plaintiff had stated a claim for violation of anti-retaliation provisions of Title II, he did not show, as required by *Georgia*, that the misconduct alleged also violated the Fourteenth Amendment. The court found that only if the defendant's conduct "*actually* violated the Fourteenth Amendment [does] the analysis end, as abrogation is proper under the rule established in *Georgia*." Plaintiff did advance two Fourteenth Amendment claims: 1) a violation of the equal protection clause and 2) a violation of the due process clause. The court rejected plaintiff's equal protection argument, noting that he failed to identify similarly situated individuals who received more favorable treatment by the defendant. Further, the court held that plaintiff did not have a due process property interest in readmission to the university and thus failed to state a due process claim.

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

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

See also Bowers v. National Collegiate Athletic Ass'n, 475 F.3d 524 (3d Cir. 2007); *Ass'n for Disabled Americans v. Fla. Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) (finding Congressional abrogation of sovereign immunity with respect to public education to be valid).

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

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

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violations. Thus, punitive damages are not available under Title II of the ADA or Section 504 of the Rehabilitation Act.

Subsequent Interpretation by Lower Courts:

- ***Kuehu v. United Airlines, Inc.*, 2016 WL 4445743 (D. Haw. 2016)**

Plaintiff, a reservation sales and service representation in defendant's call center, brought an action under the ADA and state law alleging that her employer discriminated against her on the basis of disability. Plaintiff took medical leave and was ultimately terminated. Defendant moved for partial summary judgment on a number of issues, including plaintiff's claim for punitive damages. The court held that while plaintiff could not seek punitive or compensatory damages on her retaliation claim, she could seek punitive damages as a remedy for her discrimination claim. The court distinguished plaintiff's case from *Barnes* noting that "the holding in *Barnes* was limited to § 202 of the ADA, which 'prohibits discrimination against the disabled by public entities,'" while this case involved discrimination by a private corporation. The court went on to cite Supreme Court precedent finding that "punitive damages are limited . . . to cases in which the employer has engaged in intentional discrimination and has done so 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'"

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

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

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Title III of the ADA

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

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

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

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

Subsequent Interpretations by Lower Courts:

- ***Pesce v. New York City Police Department*, 159 F.Supp.3d 448 (S.D.N.Y. 2016)**

Plaintiff was an applicant to the New York City Police Department who was medically disqualified after disclosing that he had a seizure disorder and took anticonvulsant medication. Plaintiff brought suit alleging violations of the ADA, Rehabilitation Act, and New York's Human Rights Law. The plaintiff argued that the NYPD's blanket policy of excluding candidates with a seizure disorder and who are taking anticonvulsant medication was per se discrimination. The defendants raised a direct threat defense and moved for summary judgment. The defendants relied on *Bragdon* for the argument

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that “a good faith belief, grounded in medical and other objective evidence, prohibits a finding of disability discrimination.” The court disagreed, finding that *Bragdon* does not stand for the proposition that introducing *any* objective medical evidence entitles a defendant to summary judgment; rather, the court must examine the “medical and other objective evidence presented by [both] parties.” Since the parties in *Pesce* introduced conflicting evidence, the court held that summary judgment would be inappropriate on a direct threat defense.

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

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

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

The Court next addressed whether Title III was violated in this case. While admitting that allowing Martin to use a cart would be a reasonable modification to its policies, the PGA argued that it was nonetheless not required to provide a cart under Title III because such a modification would “fundamentally alter the nature” of PGA events. The Court did not agree and held that allowing Martin to use a cart would not be a fundamental alteration. It reasoned that walking is not a fundamental character of golf, evidenced by the focus of the Rules of Golf, which do not mention walking. The Court also noted that many tournaments at various levels of play allow carts, including professional tournaments on the Champions PGA Tour (for golfers age 50 and over), and in Qualifying School for the PGA. The Court further reasoned that the fatigue from walking a golf course -- the PGA's given reason for its walking rule -- is not significant. Rather, greater fatigue is incurred due to the psychological stress and motivation

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present in the game, which will be equally applicable to Martin. Finally, the Court emphasized that under Title III, an individualized inquiry is necessary, and that even if walking does cause fatigue, Martin endures greater fatigue due to his disability, with a cart, than do his walking competitors. Therefore, he would not have an unfair competitive advantage. The Court concluded that providing Martin with a cart was therefore a reasonable modification that would not fundamentally alter the nature of PGA tournaments.

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

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

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

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

Subsequent Interpretations by Lower Courts:

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- ***A.H. by Holzmüller v. Illinois High School Association*, 881 F.3d 587 (7th Cir. 2018)**

Plaintiff was a high school student with cerebral palsy who competed as a member of his school's track team. He sought from the Illinois State High School Association ("IHSA"), which runs the state championship program and other events, a separate division with different time standards for para-ambulatory runners in the Sectional and State championship track meets. When IHSA denied plaintiff's requests, he brought claims for injunctive relief under federal civil rights laws, including Title III of the ADA. The court granted summary judgment to IHSA. The court distinguished plaintiff's case from *Martin*, noting that in *Martin* "allowing a competitor to use a cart between shots did not alter the essential nature of the game," while altering the standards for racers and "rewarding a slower runner would, of course, be antithetical to the nature of a footrace." The court went on to note that *Martin's* holding emphasized that "the point of the reasonable accommodation requirement was to facilitate 'the chance to qualify for, and compete in, the athletic events [offered] to those members of the public *who have the skill and desire to enter.*'" The district court found that since A.H. did not claim he had the skill to compete with other runners, his request was inconsistent with *Martin*. The Court of Appeals affirmed, holding that A.H. could not prove that, but-for his disability, the normal operation of the qualifying times would have allowed him to qualify for the competitions. The Court also held that the requested accommodations were not reasonable: "The Rehabilitation Act and the ADA do not require the IHSA to alter the fundamental nature of their track and field events. Therefore, A.H.'s accommodation requests are unreasonable as a matter of law." Judge Rovner filed a written dissent, challenging the Court's use of a "but-for" analysis in this context.

- ***Nathanson v. Spring Lake Park Panther Youth Football Ass'n*, 129 F.Supp.3d 743 (D. Minn. 2015)**

Nathanson involved four individuals who were deaf whose primary mode of communication was American Sign Language ("ASL"). Two of the plaintiffs were children who played football in the defendant's association and were denied interpretative services for games and practices. The other two plaintiffs were the children's parents, who were also deaf, and were denied interpretative services at events held by the defendant's association. The plaintiffs alleged violations of Title II of the ADA and the state's human rights laws. The defendant argued that the ADA claim must be dismissed because, as an association, it was not a place of public accommodation. The court disagreed and cited *Martin's* holding that Title III applied to the PGA, another sports association. The defendants also argued that it does not "operate" the public accommodation because it does not exercise the same degree of control that the PGA did over the golf courses in *Martin*. The court also rejected this argument, finding that the defendant's games and practices are presumably scheduled

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in advance with the city government, which suggests that they have some “access and control to the fields.”

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

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

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

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

The Supreme Court held that United States statutes may apply to foreign-flag ships, unless the statutes regulate matters involving only the internal order and discipline of the vessel. If a statute is to regulate such matters, then there must be a clear statement of congressional intent. Under this standard, the ADA applies to foreign-flagged cruise ships operating in U.S. waters to the extent it does not interfere with the internal operations of the ship. Without opining on the allegations' merit, the Court noted that certain discriminatory policies, such as charging persons with disabilities higher fares or requiring them to travel with companions would not interfere with “internal operations.” As for physical modifications, the Court noted that barrier removal is not “readily achievable” if it would bring a vessel into noncompliance with international safety standards or threaten shipboard safety. A plurality of the court went on to conclude that a permanent and substantial physical change qualifies as an interference of the ship's internal affairs. Therefore, such modifications may not be imposed without a clear statutory statement.

Subsequent Interpretation by Lower Courts:

- ***Schlesinger v. Belle of Orleans LLC*, 2015 WL 5944452 (W.D. La. 2015)**
In a report and recommendation by a magistrate judge, the court relied on *Spector's* holding that “a public accommodation aboard a cruise ship seems no less a public

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accommodation just because it is located on a ship instead of upon dry land.” In *Schlesinger*, plaintiff was an individual with spina bifida and used a wheelchair for mobility. Plaintiff frequently patronized a local riverboat casino, the Amelia Belle Casino/Riverboat. Plaintiff experienced serious difficulties accessing the goods and services of the riverboat including issues with steep gangways, lack of seating for people with disabilities, and excessive slopes throughout the riverboat. The court noted that the ADA’s definition of public accommodations does not include passenger vessels, but cited *Spector* and found that “those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for the purposes of Title III [of the ADA].”

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

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

Subsequent Interpretation by Lower Courts:

- ***Y.Z. ex rel. Arvizu v. Clark County School Dist.*, 54 F.Supp.3d 1171 (D. Nev. 2014)**

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In *Y.Z.*, plaintiff was a student who filed a claim with the Nevada Department of Education alleging that the school district denied him rights in violation of the Individuals with Disabilities Education Act (“IDEA”). During the administrative hearing process, plaintiff and defendant school district reached a settlement and plaintiff received compensatory education services, had his records translated, and received accommodations. Plaintiff’s attorney then filed for attorney’s fees. The defendant argued that only a party who has prevailed in a court action may recover attorney’s fees under the IDEA, not a party who has prevailed in an administrative action. The court disagreed, noting that while *Buckhannon* had left open the question of whether prevailing in an administrative action confers prevailing party status, the Fifth, Third, and Second Circuits have held that agency orders confer prevailing party status.

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

In *Perez*, inmates sued the Department of Corrections for its refusal to provide Halal meat, as required by their Muslim religion. The district court judge directed the parties to appear at a settlement conference, actively urged settlement, made his views on the law applicable to the case clear, suggested appropriate settlement terms, reviewed and revised the settlement agreement with the parties, and ultimately entered an order approving the terms of a settlement. The inmates’ attorney then filed an application for attorney’s fees. Defendant opposed the application, arguing that under *Buckhannon*, plaintiffs were not a “prevailing party,” because there was no material change in the parties legal relationship, and there was insufficient “judicial imprimatur” to satisfy *Buckhannon*. The Second Circuit disagreed and affirmed the district court’s award of attorney’s fees. Because the Department was “incapable of acting as it did before the entry of the Order,” the legal relationship of the parties had sufficiently changed. Furthermore, under *Buckhannon*, there was sufficient “judicial imprimatur,” even though this did not constitute a consent decree. The court focused on the district judge’s large involvement in creating the settlement, and his “judicial sanction” of the settlement through a court order. Because *Buckhannon* was satisfied, the inmates were a prevailing party, and attorney’s fees could be awarded.

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

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Conclusion

Although the U.S. Supreme Court decisions in the *Sutton* trilogy⁸ and *Toyota v. Williams*⁹ are no longer applicable since the ADA Amendments Act of 2008 went into effect on January 1, 2009,¹⁰ there are many Supreme Court ADA cases that are still good law. This legal brief reviewed and analyzed those decisions as well as lower court decisions applying Supreme Court precedent.

⁸ *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999) were decided at the same time by the Supreme Court and are referred to collectively as the "Sutton trilogy."

⁹ *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

¹⁰ P.L. 110-325