

# **DISABILITY LAW CASES, MATERIALS, PROBLEMS**

**FIFTH EDITION**

**2016 Supplement**

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## **NOTE ON ROTHSTEIN & ROTHSTEIN**

Throughout the text, all references to LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* (2009) should be changed to LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* (current cumulative edition). The treatise is now updated twice a year. The referenced sections in the casebook, however, remain the same.

## **Chapter 2. WHO IS PROTECTED UNDER THE LAWS?**

### **B. DEFINING DISABILITY**

#### **[1] Statutory Definitions**

*Page 36, after the definition of Disability under the Americans with Disabilities Act, add the following:*

On May 24, 2011, the Equal Employment Opportunity Commission Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, Amended, became effective. See 58 Fed. Reg. 16978-17017 (March 25, 2011), 29 C.F.R. Part 1630. The guidance, which explains the new regulations, is attached to the regulations as an appendix at 29 C.F.R. Part 1630 App. The regulations apply specifically to employment (Title I), but are probably important guidance on the definition of disability as it would apply to Title II and Title III of the ADA and to the Rehabilitation Act. The regulations make clear that the purpose of the ADAAA is to make it easier for persons with disabilities to gain protection under the ADA and the Act should be interpreted to give the broadest coverage possible. 29 C.F.R. Part 1630.1(c) (4). For a series of questions and answers that offer an excellent short guide to the regulations, see U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited June 11, 2012).

*Page 55, Notes and Questions, add to Note 2:*

For an understanding of how courts are interpreting this definitional change with reference to HIV positivity, see *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (under the ADAAA HIV positive status may substantially limit major life activity because it impairs function of immune system).

#### **[2] Prong One: A Physical or Mental Impairment that Substantially Limits A Major Life Activity**

*Page 61, add to Note 7:*

For regulatory guidance on the issue of rules of construction, see 29 C.F.R. § 1630.1(c), and the guidance at 29 C.F.R. § 16.30.1 (c) App.

*Page 63, add to Note 11:*

For the regulations, see 58 Fed. Reg. 16978-17017 (March 25, 2011), 29 C.F.R. Part 1630.

*Page 68, add to Note 2:*

The EEOC responded to Congress' directive in the ADAAA to promulgate new regulations clarifying that "the term 'substantially limits' shall be construed broadly in favor of expansive coverage" and that the term is "not meant to be a demanding standard." 29 C.F.R. Sec. 1630.2(j)(1)(i) (2013). The regulation also expressly provides that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" for purposes of proving an actual disability. 29 C.F.R. Sec. 1630.2(j)(1)(ix). In *Summers v. Altarum Institute, Corp.*, 740 F. 3d 325 (4<sup>th</sup> Cir. 2014), the court overturned a lower court's grant of the defendant's motion to dismiss the complaint on the basis that the plaintiff's impairment – fractured leg, fractured ankle, torn meniscus and ruptured patellar tendon – was temporary. It alluded to the EEOC's regulation and concluded that, given the ADAAA's instruction to construe the Act broadly, the EEOC's regulation on temporary disabilities is reasonable. Given the severity of the injuries alleged in *Summers*, the court concluded that the complaint stated a cause of action under the ADAAA when it alleged that the plaintiff was "unable to walk for seven months, and without surgery, pain medication and physical therapy, he 'likely' would have been unable to walk for far longer." According to the court, this was the first appellate case decided under the new ADAAA's expanded definition of disability. The *Summers* court also chided the lower court for its alternative conclusion that the plaintiff was not a person with a disability because he could use his wheelchair to work. The court of appeals stated, "If the fact that a person could work with the help of a wheelchair meant he was not disabled under the Act, the ADA would be eviscerated." *Id.*

*Page 68, add to Note 3:*

For the regulatory clarification on the definition of disability, see 29 C.F.R. § 1630.2(g)(1)(i)-(iii).

*Page 68, add to Note 4:*

For further discussion of the Rules of Construction, as interpreted by the EEOC, see Jana K. Terry, *The ADA Amendments Act Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last*, *The Federal Lawyer* 49, 50-51 (November/December 2011).

*Page 69, add to Note 5:*

For a case applying the ADAAA where the plaintiff had carpal tunnel syndrome, see *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL3205779 (D. Kan. July 28, 2011)(genuine issue of material fact exists as to whether plaintiff's carpal tunnel syndrome constitutes a disability).



*Page 69, add the following to the Notes and Questions:*

7. The EEOC regulations pursuant to the ADAAA provide clarification regarding both mitigating measures (29 C.F.R. § 1630.2(j) and major life activities (29 C.F.R. § 1630.2(i)). They also provide guidance about the term “substantially limits.” (20 C.F.R. § 1630.2(j)).

Since the statute has been amended and regulations promulgated there have been several judicial opinions interpreting the revised statutory and regulatory requirements. Courts have tended to find conditions such as HIV and cancer to be “per se” disabilities. See e.g., *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (under the ADAAA HIV positive status may substantially limit major life activity because it impairs function of immune system); *Demarah v. Texaco Group, Inc.*, 88 F. Supp. 2d 1150 (D. Colo. 2000) (employee who underwent double mastectomy could be disabled under ADA when she had trouble walking and caring for herself); *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010) (even though renal cell carcinoma was in remission, the ADAAA’s clear language requires a finding of a disability where the condition would substantially limit a major life activity if it were active). Even before the amendment some courts had reached broad interpretations of the definition when it came to physical disabilities like cancer. See e.g., *Kennedy v. England*, 2006 WL 1129405 (D.S.C. 2006) (cancer is per se disability). The decisions on mental health impairments and learning disabilities are mixed. See, e.g. *Kinney v. Century Services Corp. II*, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011)(even though plaintiff’s depression was “inactive” and did not impact her work performance, the fact that she had been hospitalized for the condition and her debilitating symptoms when active raised a genuine issue of fact as to whether she was a qualified individual under the ADA); *Klute v. Shinseki*, 840 F. Supp. 2d 209 (D.D.C. Jan 9, 2012)(attorney with adjustment disorder alleged the federal government, his employer, unreasonably denied him a reasonable accommodation, but court concluded that even under the new ADAAA the plaintiff’s claim merely showed that he was unable to work only with a particular supervisor or in a particular workplace, and therefore, there was no genuine issue of material fact whether there was a substantial limitation of the major life activity of working).

### **[3] Prong Two: A Record of Such an Impairment**

*Page 70, add text to end of the section:*

The regulations under the ADAAA clarify what is meant by “record of.” See 29 C.F.R. § 1630.2(k)(1).

#### **[4] Prong Three: Being “Regarded As” Having Such an Impairment**

*Page 72, add to Note 1:*

For the regulatory clarification on the definition of “regarded as,” see 29 C.F.R. § 1630.2(g)(3) and 1630.2(l). Whether an impairment is “transitory and minor” is an objective inquiry that does not depend on the employer’s belief. See 29 C.F.R. § 1630.15(f) and the accompanying appendix; *Gaus v. Norfolk Southern Ry. Co.* 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (employee is “regarded as” having a disability even if the employer subjectively believed that the impairment was transitory and minor).

Since the 2008 amendments, several judicial decisions have applied the updated standard, reflecting a broader interpretation than might have occurred before the 2009 effective date. For example, in *Roman-Oliveras v. Puerto Rico Elec. Power Authority*, 655 F.3d 43 (1st Cir. 2011) a court found that an employee was perceived as disabled where the employer removed him from his position and forced him to undergo multiple psychiatric evaluations and despite favorable test results was not allowed to work. The court in *Kagawa v. First Hawaiian Bank/Bancwest Corp.*, 819 F. Supp. 2d 1125 (D. Haw. 2011) concluded that where the employer ordered an employee to go to counseling or be fired and manager's report stated that she “hears a voice,” the employee was “regarded as” having a disability. See also *Johnson v. Peake*, 755 F. Supp. 2d 888 (W.D. Tenn. 2010) (director's repeated statements that she would not hire someone with history of chemical dependency shortly before reassigning the chief was evidence that director regarded him as disabled). Courts have begun to clarify that believing that an individual is precluded from working at one particular job does not reach the level of “regarding” that person as disabled. See e.g., *Wolski v. City of Erie*, 900 F. Supp. 2d 553 (W.D. Pa. 2012).

*Page 75, add to Note 5.*

The EEOC has taken the position that the ADAAA is not retroactive. See U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited June 11, 2012).

## Chapter 3. EMPLOYMENT

Since the enactment of the Americans with Disabilities Amendments Act (“ADAAA”), there is an enormous body of case law developing in the area of employment. Major issues courts have addressed are whether individuals meet the definition of disability, whether they are otherwise qualified, issues of essential functions, drug tests and other medical testing in the employment process, the relationship between an adverse employment action and a disability, and what is required to demonstrate a request for an accommodation and the related interactive process expected. The major specific developments worth noting are the following: what constitutes a “record” of a disability, what constitutes being “regarded as” having a disability, lifting as a “major life activity,” whether HIV positivity and diabetes are per se disabilities, under what conditions psychological tests or counseling constitute medical examinations under the statute, whether the ADA requires an employer to reassign a worker with a disability to another position even if there is another applicant who is more qualified for the position, and whether a public employee may sue the employer for employment discrimination under Title II of the ADA.

### **A APPLICABILITY OF TITLE I OF THE AMERICANS WITH DISABILITY ACT AND THE REHABILITATION ACT**

#### **[1] Which Employers Are Covered?**

*Page 93, add to Note 3:*

3. *(after the third paragraph)* The regulations on the definition of “record” of a disability make clear that whether an individual has a record of a disability should be construed broadly “to the maximum extent possible and should not demand extensive analysis.” A person will be considered to have a record of a disability if he or she has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having a disability. Persons with a record of a disability are entitled, under some circumstances, to a reasonable accommodation. *See* 29 C.F.R. Part 1630.2 (k).

Since the passage of the ADAAA, the regulations on the definition of “record” of a disability make clear that whether an individual has a record of a disability should be construed broadly “to the maximum extent possible and should not demand extensive analysis.” A person will be considered to have a record of a disability if he or she has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having a disability. Persons with a record of a disability are entitled, under some circumstances, to a reasonable accommodation. *See* 29 C.F.R. Part 1630.2 (k). *See Williams v. AT & T Mobility Servs., LLC*, No. 2:15-cv-02150-STA-dkv, 2016 WL 2858930 (W.D. Tenn. May 16, 2016)

(“Plaintiff also contends that her severe depressive disorder and anxiety are disabilities covered by the ADA because AT & T had a record of Plaintiff’s impairments. A plaintiff has a “record of impairment” if she “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” This prong includes “people who have recovered from previously disabling conditions ... but who may remain vulnerable to the fears and stereotypes of their employers”). The plaintiff needs to show only that “at some point in the past” she had a substantially limiting impairment; *Fortkamp v. City of Celina*, No. 3:14CV438, 2016 WL 375075, at \*8 (N.D. Ohio Feb. 1, 2016) “ I agree with Fortkamp that the records documenting his back injury in 2003, his physical condition thereafter, and his ensuing multi-year absence are evidence of a ‘record of impairment.’ Because this evidence would permit a jury to find Fortkamp “disabled,” summary judgment is unwarranted on this issue”); *Ferrari v. Ford Motor Co.*, 96 F. Supp. 3d 668, 674-75 (E.D. Mich. 2015) (“Plaintiff’s records demonstrate a history of a neck injury that substantially limited at least one major life activity. However, the record also shows unequivocally that plaintiff, his doctors, and defendant all regarded the neck-based disability as entirely resolved at the time the adverse employment decision was made. Accordingly, plaintiff qualifies as disabled based on the record of his neck-based disability”); *Carper v. TWC Servs.*, 820 F. Supp. 2d 1339, 1354 (S.D. Fla. 2011) (holding that the employer must be aware of and must rely on the record in question).

29 C.F.R. Part 1630.2(l) establishes the regulations for determining whether a person will be “regarded as” having a disability. 29 C.F.R. Part 1630.15 (f) establishes how an employer may prove a defense to a “regarded as” claim that the impairment or perceived impairment is transitory and minor.

*Page 94, add Note 5:*

5. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court held unanimously that the first amendment establishment and free exercise clauses create a broad “ministerial exception” to the ADA. In *Hosanna-Tabor*, the EEOC alleged that the defendant had violated the ADA’s anti-retaliation provision by firing a teacher with narcolepsy in a church school because she had threatened to bring an ADA lawsuit against the defendant. The Supreme Court held that the First Amendment to the U.S. Constitution precluded a lawsuit brought under the ADA because the ADA should not apply to the employment relationship between a church and its ministers. The Court sanctioned a broad definition of the term “minister” for purposes of the exception. Even though the teacher was not an ordained minister of the church, the Court categorized her as a “minister,” and held that she did not have a cause of action under the ADA.

## **[2] Applicability of The Three-Prong Definition of Disability to Employment**

In *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015), the Supreme Court held that the Pregnancy Discrimination Act requires an employer to grant a reasonable accommodation to a pregnant woman with a 20 pound lifting restriction if she can prove that other employees who were not pregnant with similar inability to work were given accommodations, that the employer's policy created a significant burden on pregnant women and that the employer's "legitimate non-discriminatory reason" was not sufficiently strong to justify the burden on pregnant women.

The Court noted that the facts in *Young* occurred before the enactment of the Americans with Disabilities Act Amendments Act (ADAAA), which went into effect in 2009. It raised the question without deciding it whether the new Title I regulations under the 2009 Amendments, if applicable to *Young*, would grant a right to a pregnant woman to accommodate her lifting restrictions. The regulations to the new ADAAA state that a disability does not have to last six months or longer to be considered a disability and the guidance gives the example of an employee with a bad back with a 20 pound lifting restriction that lasts for a number of months. The guidance notes that this person would have an impairment that substantially limits the major life activity of lifting and would therefore be covered by the ADA. Thus, the reasonable accommodations provisions of the ADA would apply. See 29 C.F.R.1630.2 (j)(1)(ix) and 29 C.F.R.1630.2 (j)(1)(ix) Appendix (interpretive guidance). It appears that a pregnant woman who has similar lifting restrictions due to her pregnancy may be a person with a disability under the ADA and therefore have a right to reasonable accommodations.

*Page 95, after the first sentence, add:*

29 C.F.R. Part 1630.1 (c) states that in general this part does not apply a lesser standard than that imposed by Title V of the Rehabilitation Act of 1973 or its regulations.

*Page 95, add to Note 2:*

See 29 C.F.R. § 1630.15(f) and the accompanying appendix; *Gaus v. Norfolk Southern Ry. Co.* 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (employee is "regarded as" having a disability even if the employer subjectively believed that the impairment was transitory and minor).

*Page 96-98, add to Notes and Questions:*

3. (*p. 96, after the first paragraph*) The regulations list a number of impairments that in most if not all cases will substantially limit a major life activity. The regulations state that depressive disorder and bipolar disorder substantially limit the major life activity of brain function. 29 C.F.R. Part 1630.2 (g) (3) (iii). (*Page 96, add to the end of Note 3*) See U.S. Equal Employment Opportunity

Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*,

[http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited June 11, 2012).

5. (*p. 97, after the first paragraph*) See U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited June 11, 2012). Cases decided since the passage of the ADAAA seem to continue to use the same pre-ADAAA standard. See *Nurridin v. Bolden*, 818 F.3d 751 (D.C. Cir. 2016); *Nurridin v. Bolden*, 818 F.3d 751 (D.C. Cir. 2016).

(*p. 97, after the last paragraph*) There is a new regulation since the passage of the ADAAA that designates lifting as a major life activity. See 29 C.F.R. pt. 1630, App., §1630.2(i). The regulation states that a person with a back impairment who has a 20-pound lifting restriction that lasts for several months is a person with a disability under the first prong of the definition. See 29 C.F.R. pt. 1630, App. §1630.2(j)(1)(ix).

6. (*p. 97, after the paragraph*) The regulations state that HIV substantially limits immune function. 29 C.F.R. Part 1630.2 (g) (3) (iii). See *Horgan v. Simmons*, 704 F. Supp. 2d 814, 2010 U.S. Dist. LEXIS 36915 (N.D. Ill. 2010) (concluding that the plaintiff's allegation that he was HIV positive was sufficient to withstand defendant's motion to dismiss because if proven, plaintiff was a person with a disability under the ADAAA because HIV substantially limits immune function). But see *Rodriguez v. HSBC Bank USA, N.A.*, No. 8:14-cv-945-T-30TGW, 2015 U.S. Dist. LEXIS 157883 (M.D. Fla. Nov. 23, 2015) (stating that the regulations are not controlling, and HIV creates only a rebuttable presumption of affecting a major life activity, and concluding that there was no evidence that Plaintiff was limited in a major life activity by HIV); *Baptista v. Hartford Bd. of Educ.*, 427 F. App'x 39 (2d Cir. 2011) (affirming dismissal of plaintiff's complaint for neglecting to allege *how* HIV limited a major life activity).
8. (*top of p. 98*) The regulations state that an employer may not use a qualification standard for uncorrected vision unless the employer can prove that the qualification is job related and consistent with business necessity. 29 C.F.R. Part 1630.10.

*Page 100, following the end of the carryover paragraph from p. 99 add:*

29 C.F.R. Part 1630.16 gives a list of permitted activities for an employer.

*Page 107, add the following:*

3. *(end of third paragraph)* The ADAAA makes bodily functions “major life activities” for purposes of the ADA, and most courts have decided under the ADAAA that HIV is either a per se disability or close to one. The regulations state that HIV substantially limits immune function. 29 C.F.R. Part 1630.2 (g) (3) (iii).

*Page 111-14, add to Notes and Questions:*

9. *(p. 113, end of first full paragraph)* In *Kroll v. White Lake Ambulance*, 691 F.3d 809 (6th Cir. 2012) (Kroll I), the court held that there was a genuine issue of material fact as to whether psychological counseling, which was required of the plaintiff for her to return to work, constituted a medical exam under the ADA. In a subsequent appeal in the same case, *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619 (6<sup>th</sup> Cir. 2014) (Kroll II), the court held that to sustain its burden of proving job-relatedness and business necessity, an employer who requires a medical exam (psychological counseling in this case) must demonstrate that the employee's ability to perform the essential functions of the job is impaired or that the employee poses a direct threat to himself or others. The employer who decides to require a medical examination must have a reasonable belief based on objective evidence that the employee's behavior threatens a vital function of the business.

*(p. 113, end of the second full paragraph)* Another issue that courts are confronting is the use of marijuana for medicinal purposes. Even in states where marijuana is legal for medicinal purposes, the state courts have held that the employee has no right to use medical marijuana, even outside of the workplace, and even if it does not impair the employee's ability at work. Thus, employers are permitted to discipline or discharge these employees for their use of marijuana. See, e.g. *Coats v. Dish Network LLC*, 350 P. 3d 849 (Colo. 2015). Although these rulings appear to violate the ADA, federal criminal law continues to rate marijuana as a Schedule I narcotic, whose use is prohibited by federal law. Federal criminal law, then, is supreme to state law where there is a conflict. As of today, no courts have concluded that the ADA overruled federal criminal law in this regard.

#### **[a] Attendance Requirements**

*Page 161, add the following to Notes and Questions:*

*(end of Note 1, p. 161)* A recent case in the Ninth Circuit distinguished *Humphrey*. In *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9<sup>th</sup> Cir. 2012), the court held that regular attendance was an essential function of the job of a neo-natal nurse. In doing so, it stressed the differences between the job of a medical transcriptionist in *Humphrey* and that of a neo-natal nurse who must be present to provide care. In *EEOC*

*v. Ford Motor Co.*, 782 F.3d 753 (6<sup>th</sup> Cir., 2015) (en banc), the en banc Sixth Circuit overturned a 2-1 panel decision that had held that in the case of a resale steel buyer at Ford with irritable bowel syndrome, there was a jury question whether working from home up to four days per week was a reasonable accommodation. Even though the employee spent much of her time working by telephone and on the computer, the en banc court concluded as a matter of law that being in the workplace was an essential function because at least four of the employee's ten work responsibilities could not be performed from home, and two more could not be performed effectively from home. Finally, the court concluded, it was necessary to be available for face-to-face meetings with co-workers, stampers and suppliers.

*Page 161, insert the following before Working Overtime*

**[b] Employer-Provided Leaves**

The EEOC has recently analyzed the effect of the ADA on employer-provided leaves. According to the guidance, an employer may be required to provide additional *unpaid* leave (beyond that granted to other employees) to a person with a disability if that leave constitutes a reasonable accommodation. This determination must be made on an individual basis, and employers may not create absolute deadlines for the person with a disability to return to work unless the accommodation requested is unreasonable or the employer can prove that an extended leave would create an undue hardship. An employer may not require that its employee not return to work until the employee's health is 100% (a common practice because of employers' fears of liability under the state worker's compensation statute), as there may exist a reasonable accommodation that would permit employees to return to work without reaching 100% health. See *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), [https://www.eeoc.gov/eeoc/publications/ada-leave.cfm?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdeliver%20y&utm\\_term=](https://www.eeoc.gov/eeoc/publications/ada-leave.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdeliver%20y&utm_term=)

**[c] Working Overtime**

*Page 162, add at the end of this section:*

See also, *Hoffman v. Carefirst of Fort Wayne, Ind.*, 737 F. Supp. 2d 976, 2010 U.S. Dist. LEXIS 90879 (N.D. Ind. 2010) (holding that there were genuine issues of material fact concerning whether the plaintiff's illness that was in remission was a disability and whether the employer failed to grant a reasonable accommodation when it insisted that the plaintiff work at least eight hour days with three hours of commuting).

*Page 181, add the following to Notes and Questions:*

(end of note 1, p. 182) The ADAAA seems to have changed the courts' analysis. See *Rednour v. Wayne Twp.*, 51 F. Supp. 3d 799, 812 (S.D. Ind. 2014) (parties did not dispute that Type 1 diabetes constitutes a disability); *Tadder v. Bd. of Regents of Univ. of*



*Wisconsin Sys.*, 15 F. Supp. 3d 868, 884 n.9 (W.D. Wis. 2014) (“Post–ADAAA, the endocrine system is expressly listed as a “major bodily function” and its operation as a ‘major life activity.’ This would appear to generally establish diabetes as an impairment imposing a substantial limitation on a major life activity”). The regulations state that diabetes substantially limits endocrine function. 29 C.F.R. Part 1630.2 (g) (3) (iii).

(*end of note 5, p. 185*) See the discussion of GINA, The Genetic Information Nondiscrimination Act, *infra*, this chapter. Even if the ADA might permit an employer to discriminate based on a genetic predisposition, it is unlikely that GINA would permit such discrimination.

## **E REASONABLE ACCOMMODATION AND UNDUE HARDSHIP**

*Page 194-5, add the following to Notes and Questions*

(*Page 194-5, note 3, replace the first paragraph with the following*) *The ADA and Stigmatizing Appearance*: The EEOC’s Interpretive Guidance, 29 C.F.R. pt. 1630, App. § 1630.2(l) states, “Under the third prong of the definition of disability, an individual is ‘regarded as having such an impairment’ if the individual is subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not ‘transitory and minor.’” “To illustrate how straightforward application of the ‘regarded as’ prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability.”

### **[2] Health Impairments and Reasonable Accommodations**

*Page 214, add the following to Notes, immediately before Note 2:*

29 C.F.R. Part 1630.16 (d) states that it is not a violation of the Act for employers to prohibit or impose restrictions on smoking in places of employment.

### **[3] Physical Impairments and Reasonable Accommodations**

*Page 217, add the following to Notes and Questions:*

(*end of Note 5, p. 217*) In *Feist v. Louisiana*, 730 F.3d 450 (5<sup>th</sup> Cir. 2013), the plaintiff suffered from a knee condition that made it difficult for her to walk the two cobblestoned blocks from the parking lot assigned to her to work, and requested a parking spot in the parking garage adjacent to her workplace. The employer refused the closer spot. Plaintiff sued, alleging a violation of the ADA, and the defendant filed a motion for summary judgment on the basis that the parking spot did not enable her to perform the essential functions of the job. The court of appeals overturned the lower court, holding that according to the EEOC reasonable regulation, a plaintiff need not demonstrate that a requested accommodation enabled her to perform the essential functions of her job. The plaintiff needs only to demonstrate that the requested accommodation was reasonable.

*But see* Regan v. Faurecia Automotive Seating, Inc., 679 F.3d 475 (6<sup>th</sup> Cir. 2012) (holding that an employer did not have to accommodate an employee with narcolepsy who found her changed work schedule very tiring because it increased her commute time).

(*end of Note 7, p. 218*) At one point, the Occupational and Safety Health Administration (“OSHA”) promulgated an ergonomic rule that was opposed by business. See Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word* (*Ergonomics*) Again?, 63 ADMIN. L. REV. 707, 724-28 (2011) (discussing the path of the OSHA ergonomic rule from its beginnings to its eventual veto by Congress under the Congressional Review Act). The Obama Administration has not issued comprehensive ergonomic regulations, but rather, “OSHA has developed industry specific guidelines to provide specific and helpful guidance for abatement to assist employees and employers in minimizing injuries.” Occupational Safety & Health Administration, *Ergonomics: Standards and Enforcement FAQs*, <https://www.osha.gov/SLTC/ergonomics/faqs.html>.

*Page 229-30, add the following to Notes and Questions*

(*end of note 1, p. 229*) The EEOC Guidance takes the position that reassignment does not merely mean that employees with disabilities are permitted to compete for vacant positions. It actually means that they have a right to the vacant positions if they are qualified for them. Otherwise, the EEOC says, “reassignment would be of little value.” The circuit courts are split as to whether the ADA requires as a reasonable accommodation the reassignment of a disabled worker over a more qualified nondisabled candidate, although the case law is trending towards agreement with the EEOC.” BLOOMBERG BNA AMERICANS WITH DISABILITIES ACT MANUAL § 20:467.

## **F DISABILITY-BASED HARASSMENT AND RETALIATION**

*Page 241, add after Note 1:*

In May 2013, the EEOC was awarded a \$240 million jury verdict, the largest in its history, in a case alleging severe discrimination under the ADA and abuse of employees with mental disabilities. The employees were men who worked at a turkey processing plant who, according to the testimony, were called names such as “retard” and physically abused. See <http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>

In recent decisions where plaintiffs have claimed that the employer retaliated, the plaintiff generally is not able to meet the burden of proving that motivation. Nonetheless, it remains a significant factor that merits training of employee supervisors and those implementing human resources policies.

## **H RELATIONSHIP OF ADA TO OTHER FEDERAL AND STATE LAWS**

*Page 255, add to end of Note 7:*

A recent Tenth Circuit case, however, concluded under Section 504 of the Rehabilitation Act that a university that refused to consider giving more than six months' leave, where it had a six month inflexible sick leave policy, as an accommodation to the plaintiff's cancer did not violate the Act. See *Hwang v. Kansas State University*, 2014 WL 2212071 (10<sup>th</sup> Cir. May 29, 2014). There is a question whether this is a correct interpretation of the reasonable accommodation requirement under the ADA given that the ADA requires an individual determination.

In *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015), the Supreme Court held that the Pregnancy Discrimination Act requires an employer to grant a reasonable accommodation to a pregnant woman with a 20 pound lifting restriction if she can prove that other employees who were not pregnant with similar inability to work were given accommodations, that the employer's policy created a significant burden on pregnant women and that the employer's "legitimate non-discriminatory reason" was not sufficiently strong to justify the burden on pregnant women.

The Court noted that the facts in *Young* occurred before the enactment of the Americans with Disabilities Act Amendments Act (ADAAA), which went into effect in 2009. It raised the question without deciding it whether the new Title I regulations under the 2009 Amendments, if applicable to *Young*, would grant a right to a pregnant woman to accommodate her lifting restrictions. The regulations to the new ADAAA state that a disability does not have to last six months or longer to be considered a disability and the guidance gives the example of an employee with a bad back with a 20 pound lifting restriction that lasts for a number of months. The guidance notes that this person would have an impairment that substantially limits the major life activity of lifting and would therefore be covered by the ADA. Thus, the reasonable accommodations provisions of the ADA would apply. See 29 C.F.R.1630.2 (j)(1)(ix) and 29 C.F.R.1630.2 (j)(1)(ix) Appendix (interpretive guidance). It appears that a pregnant woman who has similar lifting restrictions due to her pregnancy may be a person with a disability under the ADA and therefore have a right to reasonable accommodations.

### **[4] Genetic Information Nondiscrimination Act (GINA)**

*Page 258, add to end of carryover paragraph at top of page*

It appears that the Commission has not as yet been funded or constituted.  
See PRACTICAL LAW LABOR & EMPLOYMENT, DISCRIMINATION UNDER GINA: BASICS,  
PRACTICAL LAW PRACTICE NOTE 4-615-0265.

*Page 258, replace first full paragraph with the following*

It appears that the Commission has not as yet been funded or constituted. See PRACTICAL LAW LABOR & EMPLOYMENT, DISCRIMINATION UNDER GINA: BASICS, PRACTICAL LAW PRACTICE NOTE 4-615-0265.

### **EEOC Regulations**

GINA gives the EEOC the authority to write regulations implementing the statute. The EEOC issued the proposed regulations on November 9, 2010, and the regulations took effect January 10, 2011. See Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912 (Nov. 9, 2010) (codified at 29 C.F.R. pt. 1635).

*Page 259, replace first full paragraph with the following*

### **[5] Mental Health Parity and Addiction Equity Act and the Affordable Care Act**

The original Mental Health Parity Act (MHPA), signed into law by President Clinton in 1996, and the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA), signed into law by President George W. Bush in 2008, 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-5, apply to large group health plans. MHPA required parity between offered physical and mental health insurance benefits in the context of lifetime and annual spending caps. MHPAEA required parity between offered physical and mental health insurance benefits in the context of financial requirements (e.g., deductibles, co-payments, and coinsurance amounts) and treatment limitations (e.g., inpatient day limitations and outpatient visit limitations).

Neither MHPA nor MHPAEA required large group health plans to offer any particular mental health or substance use disorder benefits, however. Until President Obama signed the Affordable Care Act (ACA) into law in 2010, it was legal for a large group health plan to simply not offer any mental health or substance use disorder benefits as a way of avoiding the parity requirements set forth in MHPA and MHPAEA.

The ACA is very important, then, because it requires exchange- and non-exchange offered individual and small group health plans as well as Medicaid benchmark and benchmark equivalent plans to offer ten sets of essential health benefits (EHBs), including mental health and substance use disorder benefits. See 42 U.S.C. 18022(b)(1)(A)-(J). Although the ACA does not list particular diagnostic examinations, medical treatments, or surgical procedures that are considered EHBs, the ACA does require each state to select a benchmark plan that will serve as a reference plan for the minimum EHBs in each state. Nevada, for example, selected the Health Plan of Nevada Solutions HMO Platinum Plan for years 2017 and forward. This plan tells Nevadans who have individual or small group insurance or Medicaid benchmark or benchmark equivalent insurance what their EHBs are. Unfortunately, the EHBs do not apply to the

large group plan context, the self-insured group plan context, or the grandfathered health plan context, leaving millions of Americans without EHBs.

## **I ENFORCEMENT**

### **[2] Section 503 of the Rehabilitation Act**

*Page 259-60 add the following*

*(end of first paragraph, p. 259)*

The standards used to determine whether this section has been violated in a case alleging employment discrimination are those applied under title I of the ADA and the provisions of sections 501 through 504, and 510, [1] of the ADA (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment 29 U.S.C. § 793 (d).

*(end of third paragraph, p. 260)*

Courts have consistently ruled that there is no private right of action created under Section 503 and the only remedies available are through the administrative agency. See 9-162 LARSON ON EMPLOYMENT DISCRIMINATION § 162 (2015)

### **[3] Section 504 of The Rehabilitation Act**

*Page 260, add the following*

*(end of first paragraph, p. 260)*

The standards used to determine whether this section has been violated in a case alleging employment discrimination are those applied under title I of the ADA and the provisions of sections 501 through 504, and 510, [1] of the ADA (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment 29 U.S.C. § 794 (d).

### **[4] Title I of The Americans with Disabilities Act**

*Page 262, add the following*

*(Replace the second full paragraph, p. 262 with the following)*

Individuals seeking redress under Title I of the ADA are required to file a charge with the Equal Employment Opportunity Commission. The EEOC may attempt conciliation after a complaint has been investigated. Only after conciliation has failed may the EEOC pursue a civil action through the courts. And, in the vast majority of cases, the EEOC does not bring a case in its own behalf. After the EEOC makes a final determination of

cause or no cause, it will provide the complainant with a “Letter of Right to Sue,” which the plaintiff can use to bring suit on her own behalf in federal or state court. If the plaintiff wishes to go to court sooner, it may request a right to sue letter after the EEOC has had the charge for 180 days, but has not reached a determination of cause or no cause.. [42 U.S.C. § 2000e-5](#).

**[5] Title II of The Americans with Disabilities Act**

*Page 263, add at the end of the first full paragraph of [5]:*

A circuit split has developed on the question of whether a public employee may sue the employer for employment discrimination under Title II of the ADA. A number of courts have concluded that Title II does not apply to relations between state and local government employers and employees, but applies only to services, programs or activities furnished by a public entity. See *Reyazuddin v. Montgomery Cnty., Md.*, 789 F.3d 407, 420 (4<sup>th</sup> Cir. 2015) (“Our sister circuits have divided on this issue . . . The Second, Seventh, Ninth, and Tenth Circuits have held that litigants asserting public employment discrimination claims against their state and local government employers cannot rely on Title II . . . In addition, the Third and Sixth Circuits ‘have expressed the view that Title I is the exclusive province of employment discrimination within the ADA. . . . Only the Eleventh Circuit has reached a contrary conclusion. . . . We join the majority view.’”) But see *Bledsoe v. Palm Beach Soil and Water Conservation Dist.*, 133 F.3d 816 (11<sup>th</sup> Cir. 1998) (concluding that *Chevron* deference applies and applying Title II to an employment discrimination case brought by a public employee). Title I applies to state and local employees, but in the case of state employees, the Eleventh Amendment prohibits money damages brought against the state. See *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), reproduced at p. 243.

## Chapter 4 PUBLIC ACCOMMODATIONS

### A OVERVIEW

*Page 265, add before the last sentence in the last full paragraph:*

In *Gilstrap v. United Airlines, Inc.*, 709 F. 3d 995 (9<sup>th</sup> Cir. 2013), the court held that an airline terminal was not a public accommodation under the ADA because air terminals are covered by the Air Carrier Access Act.

*Page 281, add to the Notes:*

3. The application of Title III to the Internet has been the subject of a number of judicial decisions, with inconsistent results. Compare *National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d (D. Mass. 2012) (subscription video company video streaming website is a place of public accommodation; applying *Carparts* analysis; action sought to require closed captioning for all content on video streaming website; not an irreconcilable conflict between ADA requirements and those set by *Twenty-First Century Communications and Video Accessibility Act* with *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9<sup>th</sup> Cir. 2000) and *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (websites not a places of public accommodation).

*Page 286, add to the Notes:*

3. Courts have addressed the application of Title III of the ADA to an increasingly individualized set of situations. See *National Federation of the Blind v. Uber Technologies, Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (in a case by blind individuals claiming the refusal to transport guide dogs, leaving open the question of whether provider of taxi services was a public accommodation under Title III); *Dicarolo v. Walgreens Boot Alliance, Inc.*, 52 Nat'l Disability Law Rep. ¶ 105 (S.D.N.Y. 2016) (dismissing Title III claim regarding soda machines claimed to be inaccessible to blind individuals; ADA does not require installation of technology to allow individual to use machine independently); *Sawczyn v. BMO Harris Bank National Ass'n*, 8 F. Supp. 3d 1108 (D. Minn. 2014) (addressing inaccessible ATM machine for blind individual); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013) (application of FHA and ADA Title III to homeless shelter finding no religious exemption); *Kalani v. Castle Village*, 14 F. Supp. 3d 1359 (E.D. Cal. 2014) (addressing whether a clubhouse, sales office, and other facilities of a mobile home park are subject to the private club exception).

## **C MODIFICATION OF POLICIES, PRACTICES, AND PROCEDURES**

*Page 300, add to the end of Note 1:*

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

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

A number of judicial decisions have interpreted the 2010 regulations on issues involving service animals with a range of outcomes. These include *O'Connor v. Scottsdale Healthcare Corp.*, 582 Fed. Appx. 695 (9th Cir. 2014) (service animal at hospital). Difficulties are arising about documentation that can be requested in some cases. In *Davis v. Ma*, 848 F. Supp. 2d 1105 (C.D. Cal. 2012), *aff'd*, 568 Fed. Appx. 488 (9th Cir. 2014), the court found that a store customer's puppy was not a trained service animal, that the puppy was not fully vaccinated, and the doctor's note did not explain how puppy ameliorated back issues. Ordinarily an individual is not required to have documentation, but perhaps where the service to be provided is not apparent, some documentation may be requested. See also *Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026 (N.D. Iowa 2011) (local laws prohibiting specific breeds are inconsistent with ADA guidance on service animals). The issue of exemptions from restrictions related to animals has arisen in an array of contexts, indicating that this is becoming an increasingly important issue. See *National Federation of the Blind v. Uber Technologies, Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (granting associational standing of organization representing blind persons; leaving open the question of whether provider of taxi services



was a public accommodation under Title III; allegations that service refused to transport guide dogs); *Cordoves v. Miami-Dade County*, 104 F. Supp. 3d 1350 (S.D. Fla. 2015) (addressing expert testimony of plaintiff who was not qualified to testify about dog's status as service dog when animal had been denied access to shopping mall); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013) (FHA and ADA Title III case by blind homeless man seeking shelter in homeless shelter; no religious exemption; no demonstration of undue burden to accommodate man and his service dog). The Department of Veterans Affairs issued final regulations about the presence of animals on VA property to update the application to service dogs in addition to seeing-eye dogs. 38 C.F.R. § 1.218(a)(11).

*Page 302, add to the end of Note 5:*

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

See also *Ault v. Walt Disney World Co.*, 2011 WL 1460181, 43 Nat'l Disability L. Rep. ¶ 48 (M.D. Fla. 2011) in which the court addressed the conflict between the Department of Justice revised regulations on use of power-driven mobility devices and the plain language of Title III which requires modifications only if they are necessary. The court found that the new regulations are not entitled to deference and that the ban on these devices based on legitimate safety concerns is not a Title III violation because the device is not necessary.

## **D ARCHITECTURAL BARRIERS**

### **[1] Covered Facilities**

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

areas, swimming pools) and in public facilities (including detention and correctional facilities, judicial facilities, and residential dwelling areas).

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

*Page 309, add to Note 1:*

Effective March 15, 2011, both the Title II and Title III regulations ensure ticketing for accessible seating in stadiums and arenas. 28 C.F.R. § 35.138 and § 36.302(f). The revised regulations also clarify requirements for new construction of stadium style theater spaces. This section also requires for other assembly area seating and dispersal of seats. 28 C.F.R. § 35.151 (g).

## **[2] Accessibility Requirements**

### **[a] Alterations**

*Page 316, add to Note:*

There have been a number of cases addressing the issue of whether sidewalks, curbs and parking lots are services under Title II of the ADA. The Fifth Circuit, sitting in banc, concluded that building or altering public sidewalks is a service covered by Title II and that sidewalks themselves are services, programs or activities covered by the statute. See *Frame v. City of Arlington*, 657 F.3d 215 (5<sup>th</sup> Cir. 2011) (en banc). See also *Barden v. City of Sacramento*, 292 F.3d 1073 (9<sup>th</sup> Cir. 2002) (holding that public sidewalks and curbs are services, programs or activities under Title II). See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 6:15 (2012) and cumulative editions (citing cases).

### **[c] New Construction**

*Page 326, add to Note 2:*

Effective March 15, 2011, both the Title II and Title III regulations ensure ticketing for accessible seating in stadiums and arenas. 28 C.F.R. § 35.138 and § 36.302(f). The revised regulations also clarify requirements for new construction of stadium style theater spaces. This section also provides requirements for other assembly area seating and dispersal of seats. 28 C.F.R. § 35.151(g).

## **G TELECOMMUNICATIONS**

### **[1] Telephones**

*Page 348, add text at the end of the section before the **Problem**:*

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

*Page 349, add to text at the end of the section:*

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

### **[3] Internet and Other Web-Based Communications**

*Page 349, add to **Notes**:*

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

Whether websites are considered programs under Title III has not yet been clearly resolved by the courts. Compare *Cullen v. Netflix, Inc.*, slip opinion (9th Cir. 2015), available at <https://d3bsvxk93brmko.cloudfront.net/datastore/memoranda/2015/04/01/13-15092.pdf> (holding that they are not subject to Title III) and *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (website for Netflix not a place of public accommodation) with *National Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 26 A.D. Cas. (BNA)

1091 (D. Mass. 2012) (website is place of public accommodations in an action seeking closed captioning for all content on video streaming website. See also *National Federation of Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007), in which the court recognized that California state law is broader than federal law in applying accessibility requirements for public accommodations to all business establishments, including websites.

Even if websites are subject to Title III, there is not yet clear guidance on what would be required of entities in terms of ensuring accessibility.

## **H     ENFORCEMENT**

### **[1]     Americans with Disabilities Act**

*Page 351, add text to the end of the section:*

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

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

**[2] Air Carrier Access Act**

*Page 351, add text to end of the section:*

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

## **Chapter 5 GOVERNMENTAL SERVICES AND PROGRAMS**

### **D ARCHITECTURAL BARRIERS**

#### **[1] Application of the Architectural Barriers Act, the Rehabilitation Act, and the Americans with Disabilities Act**

*Page 366, add text before last paragraph in the section:*

As of March 15, 2011, Department of Justice regulations clarify new requirements relating to design of certain types of facilities. See 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28 C.F.R. Parts 35 and 36. The regulations address design of residential housing provided by state and local governmental entities and access requirements, and new construction and alterations of detention and correction facilities. The regulations also provide design standards for new construction and alterations for access in recreation areas (including amusement rides, boating facilities, exercise machines and equipment, fishing piers and platforms, golf facilities, miniature golf, play areas, swimming pools) and in public facilities (including detention and correctional facilities, judicial facilities, and residential dwelling areas).

### **E LICENSING PRACTICES**

#### **[2] Professional Licensing**

*Page 378, add to Notes:*

The Ninth Circuit decision in *Enyart v. National Conference of Bar Examiners*, 630 F.3d 1153 (9<sup>th</sup> Cir. 2011), allowed a preliminary injunction in a case where a bar applicant was denied computer accommodations that she had used during law school and for the California bar exam. The court noted that the technology that allowed for an enlarged screen should be considered as to whether it would “best ensure” that the test reflects the aptitude or achievement of the applicant instead of the impairment. The court noted that advances in technology should be taken into account. See also *Jones v. National Conference of Bar Examiners*, 801 F. Supp. 2d 270 (D. Vt. 2011) and *Bonnette v. District of Columbia Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011) both issuing injunctions requiring bar examiners to use screen access software).

In 2014, the Law School Admissions Council settled a case regarding the practice of “flagging” LSAT tests taken under nonstandard conditions.

<http://www.nationallawjournal.com/id=1202656088420/8.7M-Settlement-Ends-Flagging-of-Disabled-LSAT-Takers#>

See also Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?* 22 AMERICAN U. J. OF GENDER, SOCIAL POL'Y & THE LAW 519 (2014).

Department of Justice regulations, effective March 15, 2011, address the documentation requirements for obtaining accommodations on examinations. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). If documentation is required, it should be reasonable and limited to the need for the modification, accommodation or auxiliary aid or services requested. 28 C.F.R. § 36.309.

*Page 386, add to Note 1:*

In one of the few recent cases to challenge the legality of mental health history questions for professional licensing the court struck down one of the inquiries as going too far, but upheld the other three. See *ACLU-Indiana-Indiana University School of Law v. Indiana State Board of Law Examiners*, 2011 WL 4387470, F. Supp. (D. Ind. 2011). See also Louisiana Attorney Licensure System, Jocelyn Samuels, Louisiana Attorney Licensure System, U.S. Department of Justice, <http://www.ada.gov/louisiana-bar-lof.docx> (last visited May 29, 2014). Lexis Cite: 2014 Nat'l Disability L. Rep. ¶ 138 (LRP) LEXIS 27 (2014) (DOJ Findings Letter that Louisiana mental health history questions for bar admission violate Title II of the ADA) <http://www.ada.gov/louisiana-bar-lof.docx>.

## **F MASS TRANSIT**

*Page 389, add to text before Problem:*

An interesting case addressed issues of access on subway lines. In *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority*, 635 F.3d 87 (3d Cir. 2011) a summary judgment for the plaintiff was affirmed in a claim by an advocacy group that Title II ADA required accessibility in a subway station where a stairway and escalator were altered. The case recognized that different circuits have different views of what constitutes an alteration under Title II of the ADA.

## **H ACCESS TO JUSTICE**

### **[2] Criminal Justice System**

*Page 402, add text before Problems:*

Department of Justice ADA regulations effective March 15, 2011, include several provisions affecting the criminal justice system. These include provisions relating to the new construction and alteration of detention and correctional facilities and inclusion of accessible design, 28 C.F.R. § 35.151(k), and integrated housing as appropriate and

visitation rights. 28 C.F.R. § 35.152. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III).

*Page 403, add to Note 2:*

A number of recent cases have looked at the issue of training and liability for failure to train. See e.g., *Thao v. City of St. Paul*, 481 F.3d 565 (8th Cir. 2007) (no Title II liability when police officer fatally shot individual with paranoid schizophrenia who had barricaded himself in the house and lunged at officer while holding weapons, more training would not have caused different police response); *Sanders v. City of Minneapolis, Minnesota*, 474 F.3d 523 (8th Cir. 2007) (no ADA violation in claim that police were not trained to deal with individuals with mental illness); *Buben v. City of Lone Tree*, 2010 WL 3894185 (D. Colo. 2010) (possible Title II violation when law enforcement officers arrested individual with disability who was misperceived to be engaging in illegal conduct; mental disability may have caused behavior; officers deployed electroshock weapon; allowing Title II reasonable accommodation claim to proceed to determine whether city had policy on handling individuals with mental impairments during arrest); *C.C. v. State of Tennessee*, 2010 WL 3782232 (M.D. Tenn. 2010) (allowing claim to go forward brought by individual with multiple mental impairments who was injured while in a cell in a residential facility; claim involved failure to appropriately train employees who attacked him); *Scozzari v. City of Clare*, 723 F. Supp. 2d 974 (E.D. Mich. 2010) (summary judgment for city in wrongful arrest Title II ADA claim; resident with schizophrenia shot after altercation; officers' perception of criminal behavior and not based on perception that disability made conduct appear to be unlawful; rejecting failure to train theory); *Shultz v. Carlisle Police Dept.*, 706 F. Supp. 2d 613 (M.D. Pa. 2010) (no Title II violation in claim of failure to train in situation where police officers had allegedly used excessive force after restaurant patron with seizure was tasered when he refused to board gurney after EMS team arrived; no demonstration of discrimination); *Fitch v. Kentucky State Police*, 2010 WL 4670440 (E.D. Ky. 2010) (claim that law enforcement was not provided with proper training when commercial driver was arrested for drunk driving, but claimed diabetes was basis for arrest; blood test after arrest showed he had not consumed alcohol); *Abdi v. Karnes*, 556 F. Supp. 2d 804 (S.D. Ohio 2008) (504/ADA violations related to law enforcement encounters with individuals with serious mental illness, training should be provided where such encounters are highly likely); *Furtado v. Yun Chung Law*, 51 So. 3d 1269 (Fla. Dist. Ct. App. 4th Dist. 2011) (ADA claim against Sheriff for wrongful death in case by man whose mentally disabled wife was shot and killed during involuntary commitment action; discussion of training to deal with individuals with mental health problems). The highly publicized issues of police shootings involving race issues have also highlighted the importance of police training with respect to certain populations.

Other recent cases have raised the challenges that have occurred involving individuals with mental illness and physical disabilities in the criminal justice system. See, e.g., *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 43 Nat'l Disability L. Rep. ¶ 46 (S.D. Tex. 2011) (Title II can apply to arrests; denying summary judgment to city when parents alleged failure to provide reasonable accommodation during arrest; crisis



intervention team not sent to home where son with schizoaffective disorder was acting out; altercation resulted in shooting and death of arrestee). In *City and County of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765 (2015), the Supreme Court dismissed as improvidently granted the writ of certiorari of the Title II issue. In this case, two police officers shot and seriously wounded a woman with severe mental disabilities. The plaintiff sued for damages under Title II of the ADA. There was evident confusion about what San Francisco was arguing at the Supreme Court. The Court noted that the City and County argued in their certiorari petition that Title II did not apply to arrests by police, but by the time the City and County filed their briefs before the Supreme Court, they had changed their argument and accepted that Title II applied to the arrest. Instead, they argued that the plaintiff was not a qualified individual under Title II because she posed a direct threat to others. Noting that in *Pennsylvania v. Department of Corrections*, 524 U.S. 206 (1998), the Court held that Title II covers inmates in state prisons, the Supreme Court in *Sheehan* declared that it had never decided whether Title II imposes on public entities vicarious liability for monetary damages for purposeful or deliberately indifferent conduct of its employees. It noted that this is an important question, but because the parties agreed that Title II does impose vicarious liability for monetary damages, it would be improvident to decide the Title II issue. From this case, it appears that the Court is eager to visit the question of monetary damages under Title II based on vicarious liability of a public entity's employees' bad acts.

*Page 403, add to Notes:*

5. In 2014, in *Hall v. Florida*, 572 U.S. \_\_\_, 2014 WL 2178332 (2014) the Supreme Court held unconstitutional a Florida law that defined intellectual disability. Under that statute an intellectual disability required an IQ test score of 70 or less. The case involved a defendant with an IQ slightly higher than 70 who faced the death penalty. Under Florida law all further exploration of intellectual disability was foreclosed. The Court held that the law created an “unacceptable risk that persons with intellectual disability will be executed.” A 2015 Supreme Court decision again addressed this issue. In *Brumfield v. Cain*, 576 U.S. \_\_\_ (2015), the Court ruled in a case involving a death penalty inmate that the state court record had “ample evidence creating reasonable doubt as to whether Brumfield’s disability manifested itself before adulthood.” Thus he should have been allowed to have this issue considered in his case.

## **I VOTING**

*Page 409, add Note:*

In *National Federation of the Blind v. Lamone*, 813 F. 3d 494 (4<sup>th</sup> Cir. 2016) the court addressed Maryland’s absentee voting program and found that it violated Title II and Section 504. The court held that an online ballot marking tool is a reasonable modification that does not fundamentally alter the state’s absentee voting program.

## **Chapter 6 HIGHER EDUCATION**

### **A NONDISCRIMINATION IN HIGHER EDUCATION**

#### **[1] The Rehabilitation Act of 1973**

*Page 416, add to text at the end of the section:*

For a retrospective of the evolution of disability discrimination law in the context of higher education, see Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 JOURNAL OF COLLEGE & UNIVERSITY LAW 843 (2010). See also Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues*, 22 AMERICAN JOURNAL OF GENDER, SOCIAL. POL'Y & LAW 518 (2014).

#### **[2] The Americans with Disabilities Act**

*Page 417, add to text at the end of the section:*

On May 24, 2011, the Equal Employment Opportunity Commission Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, Amended, became effective. See 58 Fed. Reg. 16978-17017 (March 25, 2011), 29 C.F.R. Part 1630. This applies specifically to employment (Title I), but is likely an important guidance on the definition of disability as it applies to Title II and Title III of the ADA and to the Rehabilitation Act, including higher education.

### **B ADMISSIONS**

#### **[1] Determining Qualifications**

*Page 442, add to Note 5:*

A recent complexity has arisen with respect to how institutions of higher education can incorporate the defense of “direct threat” in determining whether someone is qualified for a program. The ADA definition of direct threat as it applies to employment is “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S. C. § 12111(3). The EEOC regulations further provide that the determination is to be based on an individualized assessment of the present ability to safely perform the essential functions of the job. Such an assessment is to be based on “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” Factors to be considered are “the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.” In the EEOC regulations on defenses involving employment cases, it

is noted that “The term ‘qualification standard’ may include a requirement that an individual shall not pose a direct threat to the health or safety *of the individual* or others in the workplace.” (emphasis added). The Supreme Court, in its decision in *Chevron U.S.A., Inc. v. Echazaba*, 536 U.S. 73 (2002) (see pages 88 and 184) held that although the statute does not refer to threat to self, the EEOC interpretation is not inconsistent with the statute. Therefore, the EEOC interpretation was upheld.

The definition of direct threat in cases involving Title II (state and local government programs) and Title III (public accommodations) is found in the regulations rather than the statute itself. Title II regulations provides that direct threat is “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies practices or procedures, or by the provision of auxiliary aids or services....” 28 C.F.R. § 35.104. A separate section provides that a public entity is not required to allow participation to an individual who poses a direct threat. 28 C.F.R. § 35.139. Such as assessment is to be individualized and based on reasonable judgment and best available current evidence.

Title III also defines direct threat in the regulations. The definition is identical to Title II. 28 C.F.R. § 36.104. The regulations further provide that a public accommodation is not required to provide services or benefits to someone who poses a direct threat to the health or safety of others. 28 C.F.R. § 36.208.

In the context of higher education and the legal profession this most often arises in the context of students with mental health or substance abuse issues. These problems may arise in the context of eating disorders, suicide attempts, and other self-destructive conduct. Universities seeking to take action because of these concerns face a dilemma about how to appropriately respond within the constraints of the ADA. The question remains whether a student who poses a direct threat to him or herself but not to others will be considered a “direct threat.”

## **[2] Standardized Testing and Other Evaluation**

*Page 448, add to Note 1:*

The Ninth Circuit decision in *Enyart v. National Conference of Bar Examiners*, 630 F.3d 1153 (9<sup>th</sup> Cir. 2011), allowed a preliminary injunction in a case where a bar applicant was denied computer accommodations that she had used during law school and for the California bar exam. The court noted that the technology that allowed for an enlarged screen should be considered as to whether it would “best ensure” that the test reflects the aptitude or achievement of the applicant instead of the impairment. The court noted that advances in technology should be taken into account. Although this case involved a bar exam rather than admissions to a higher education program, it is probable that courts would apply a similar interpretation.

See also, *Jones v. National Conference of Bar Examiners*, 801 F. Supp. 2d 270, 43 Nat’l Disability L. Rep. ¶ 224 (D. Vt. 2011) in which a preliminary injunction allowed

the screen reading software on the *Multistate Professional Responsibility Exam and Bonnette v. District of Columbia Court of Appeals*, 796 F. Supp. 2d 164, 43 Nat'l Disability L. Rep. ¶ 173 (D.D.C. 2011) in which the court also applied the "best ensures" standard from ADA regulations requiring bar examiner to allow use of certain technology.

In 2014, the Law School Admissions Council entered into a settlement agreement regarding the practice of "flagging" LSAT tests taken under nonstandard conditions. <http://www.nationallawjournal.com/id=1202656088420/8.7M-Settlement-Ends-Flagging-of-Disabled-LSAT-Takers#>.

*Page 454, add to the Notes.*

3. In *Palmer v. Davenport Civil Rights Commission*, 850 N.W. 2d 326 (S. Ct. Iowa 2014) the Iowa Supreme Court found that a chiropractic program had discriminated by not admitting a blind student. The Court stressed the importance of individualized determination and did address deference to the institution. A strong dissent questioned the reasoning of the majority opinion. Another interesting decision is *Widomski v. SUNY at Orange*, 748 F.3d 471 (2d Cir. 2014) in which the court upheld the decision about a medical technician program's student whose hands shook too much to draw blood from patients. The court found that he was not perceived to have an impairment limiting a major life activity and that he was still employable for medical technician jobs not requiring phlebotomy. The court did not reach the issue of whether he was otherwise qualified). See generally Nicole Buonocore Porter, *The Difficulty Accommodating Health Care Workers*, 9 J. HEALTH L. & POL'Y 1 (2015) (reasons for difficulty include physically rigorous nature of most jobs; most jobs involve long hours; and safety sensitivity); Leslie Francis & Anita Silvers, *The Health Care Workforce: How to Understand Accommodations*, 9 J. HEALTH L. & POL'Y 57 (2015).

### **[3] Identifying and Documenting the Disability**

*Page 455, add to Notes:*

3. Department of Justice regulations, effective March 15, 2011, address the documentation requirements for obtaining accommodations on examinations. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). If documentation is required, it should be reasonable and limited to the need for the modification, accommodation or auxiliary aid or services requested. 28 C.F.R. § 36.309.

## **C THE ENROLLED STUDENT**

### **[1] Auxiliary Aids and Services**

*Page 466, add to Notes:*

The case of *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D. N.Y. 2012), aff'd in part, vacated in part, 755 F.3d 87 (2d Cir. 2014), is addressing copyright protection issues under the fair use doctrine where colleges and universities and other nonprofit institutions use a digital library to provide access to materials for individuals with visual impairments by developing a full text searchable database and to provide the works in accessible formats. The case so far has not fully resolved those issues, but it is an important issue to follow.

A second important technology issue to watch is what accommodations are required for online courses. A 2015 settlement in a case brought by the Department of Justice against edX Inc., which was created by Massachusetts Institute of Technology and Harvard University, addresses this issue and sends a signal to other similarly situated institutions. The four-year agreement addresses modifications to the website, platform, and mobile applications. See Settlement Agreement, United States and edX Inc., Apr. 1, 2015, available at

[http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx\\_settlement\\_agreement.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf)

### **[2] Modifications of Requirements**

*Page 480, add to Notes:*

On July 23, 2010, the Department of Justice issued final ADA regulations, including regulations on service animals. The regulations became effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. Service animals are defined as those individually trained to do work or perform tasks for the benefit of an individual with a disability (including a psychiatric disability). 28 C.F.R. § 35.104 and § 36.104. The only other animal where reasonable accommodations may have to be considered are miniature horses, and the regulations specify guidance on when accommodating such animals would be appropriate. 28 C.F.R. § 35.136(i) and § 36.302(c)(9). The regulations relating to service animals clarify what animals are protected, when service animals may be removed, provisions relating to the care and supervision of such animals, inquiries that can be made about them, and where such animals can have access. 28 C.F.R. § 35.136 and § 36.302(c). While these regulations address issues involving students in the public aspect of a higher education experience, they do not directly apply to student housing or student employment settings. This clarification has not yet been issued by any regulatory agency.

There have been a number of cases involving requirements that students use electronic readers. The 2009 suits filed by the National Federation of the Blind involved using electronic reading devices that lack accessible text-to-speech function alleging that requiring use in certain classrooms is discriminatory. Settlements in some of these cases have resulted in agreements not to require such devices unless access to devices with substantially equivalent ease of use for students with visual impairments can be provided. 2009 WL 3352332 (D. Ariz. 2009).

There has been recent attention to the issue of food allergies in campus settings. Following a settlement agreement with a university about food on campus, the Justice Department released a new technical assistance document, “[Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies](#)”. Because there is not yet a case that has finally decided this issue, it is not clear what is actually required of universities with respect to modification of food service programs on campus. See [www.ada.gov](http://www.ada.gov).

### **[3] Architectural Barrier Issues**

*Page 489, add to Notes:*

On July 23, 2010, the Department of Justice issued final regulations under the ADA on a number of matters, including some architectural barrier issues. These regulations became effective on March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28 C.F.R. Parts 35 and 36. The regulations address ticketing for accessible seating in sports and similar arenas, residential housing provided by state and local governmental entities and access requirements. The Americans with Disabilities Act regulations under both Title II and Title III also apply to the new construction or alteration housing at places of education. 28 C.F.R. § 35.151(f) & § 36.406(e).

### **[4] Behavior and Conduct Issues**

*Page 497, add to Note 2:*

For a discussion of issues, see Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 JOURNAL OF COLLEGE & UNIVERSITY LAW 691 (2009). For a discussion of behavior issues related to the current students, see Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 JOURNAL OF COLLEGE & UNIVERSITY LAW 169 (2007).

### **[6] Athletics**

In response to a highly publicized situation involving a wheelchair athlete in a public school setting (<http://www.npr.org/templates/story/story.php?storyId=170229198>),

the United States Department of Education Office of Civil Rights (OCR) clarified requirements to ensure reasonable opportunities for access to athletic programs. Schools do not have to allow students with disabilities to participate in any competitive program offered; can require a level of skill to be eligible to participate in a competitive program, but the criteria must not be discriminatory. Schools cannot operate programs on the basis of stereotypes or generalizations about students with disabilities. Schools offering extracurricular athletics must allow qualified students with disabilities an equal opportunity to participate by making reasonable modifications, unless it would be a fundamental alteration to the program. Where the interests and abilities of students with disabilities cannot be fully and effectively met by the school's existing extracurricular athletics, the school should create additional opportunities for those students with disabilities that are supported as equally as school's other athletic activities. What is not clear from the guidelines is what additional opportunities “should” be provided. See Seth M. Galanter, Dear Colleague Letter, U.S. Department of Education Office for Civil Rights, Ed.gov, Jan. 25, 2013, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>. It is not clear how this will affect higher education athletic programs.

Increasing attention is being given by advocates to communications at athletic events. In *Innes v. Board of Regents of University System of Maryland*, 29 F. Supp. 3d 56 (D. Md. 2014) the plaintiff sought effective communications at athletic events and on sports websites for spectators who are deaf. The court has allowed the case to proceed under the ADA and Section 504.

## **7 EDUCATION**

### **A HISTORICAL PERSPECTIVE**

*Page 508, change definition of IDEA categorical definition to:*

In October 2010, “Rosa’s Law” changed the term *mentally retarded* to *intellectually disabled* in all federal statutes and regulations. P.L. No. 111-256 (2010). This term should be replaced throughout this casebook as appropriate.

See also Laura Rothstein, *Roads and Schools: Parallel Paths in the Government Role to Education for Students with Disabilities*, 83 MISSISSIPPI LAW JOURNAL 777 (2014).

### **C NONDISCRIMINATION AND REASONABLE ACCOMMODATION UNDER SECTION 504 OF THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT**

#### **[2] Substantive Application**

There has been recent attention to the issue of food allergies in higher education campus settings. Following a settlement agreement with a university about food on campus, the Justice Department released a new technical assistance document, “[Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies](#)”. Because there is not yet a case that has finally decided this issue, it is not clear what is actually required of universities with respect to modification of food service programs on campus and how this might apply to K-12 school settings. See [www.ada.gov](http://www.ada.gov).

*Page 575, add to Note:*

The definitional changes of “disability” resulting from the ADA Amendments Act of 2008, as discussed in Chapter 2, make it more likely that some more students will be covered than might have been the case previously. This has not been a major issue in the education context, but it could be a factor in situations such as asthma, chronic illness, and some learning and related disabilities.



## 8 HOUSING

[New guidance](#) released on April 30, 2013, by the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice, reinforces the Fair Housing Act requirement that multifamily housing be designed and constructed so as to be accessible to persons with disabilities.

For more information about HUD and the civil rights laws it enforces, go to [hud.gov/fairhousing](http://hud.gov/fairhousing) and click on “Learn more about FHEO.” More information about the Justice Department’s Civil Rights Division and the laws it enforces is available at [justice.gov/crt/index.php](http://justice.gov/crt/index.php).

## C REASONABLE ACCOMMODATION

### [3] Accommodations for Assistance or Service Animals

*Page 624, add after **Problems**:*

#### NOTES

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

Two major issues are being addressed in lower courts related to animals. One involves whether animals must only be service animals that perform a service (as is the case under Title II and Title III of the ADA) or whether comfort or emotional support animals must be a permitted accommodation in housing settings. In either case, it is yet unresolved what kind of documentation will be required to allow a variance to restrictions about animals in zoning or in private deed restrictions. See e.g., *Anderson v. City of Blue Ash*, 798 F.3d 338 (6<sup>th</sup> Cir. 2015) (miniature horse qualifies as services animal; was individually trained to do work and perform task of beneficial exercise in girl’s backyard).

Another issue is the restriction of dogs to a specific breed. It is not unusual for a zoning ordinance to prohibit pit bull dogs, but to allow other dogs. Where a pit bull dog is needed as an accommodation, the question is whether that variance must be allowed. See e.g., *Chavez v. Aber*, 51 Nat'l Disability L. Rep. ¶ 34 (W.D. Tex. 2015) (allowing case to move forward when tenant requested pit bull dog as emotional support animal).

While these regulations only apply to Title II and Title III of the ADA, they may serve as guidance for Fair Housing Act cases. Charging fees for animals will require care in determining when a waiver might be required as a reasonable accommodation. See *Fair Housing of the Dakotas, Inc. v. Goldmark Property Management, Inc.*, 778 F. Supp. 2d 1028, 42 Nat'l Disability L. Rep. ¶ 280 (D.N.D. 2011) in which there was no clear explanation about when fees applied.

## **D STRUCTURAL BARRIERS**

*Page 624, add to text after first paragraph in section:*

On July 23, 2010, the Department of Justice issued regulations effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28 C.F.R. Parts 35 and 36. Included in the revisions are provisions requiring accessible design for new construction and alterations of residential housing in places of education, 28 C.F.R. § 35.151(f) & § 36.406(e), residential dwellings for individual sale operated by public entities, 28 C.F.R. § 35.151(j), and places of lodging, 28 C.F.R. § 36.406(c). Additional requirements specify that places of lodging where guest rooms are not owned by the entity that owns, leases, or operates the overall facility and physical features of the guest room interiors are not subject to certain barrier removal requirements. 28 C.F.R. § 36.304(g)(4). Additional provisions address housing in social service centers such as group homes, halfway houses, shelters, and similar establishments that provide temporary or other sleeping accommodations. 28 C.F.R. § 35.151(e) & § 36.406(d).

## **E LEAST RESTRICTIVE ENVIRONMENT AND INDEPENDENT LIVING**

*Page 632, add to Notes:*

As more housing for senior citizens and individuals with mobility impairments becomes available, issues related to use of motorized vehicles are increasingly arising. On July 23, 2010, the Department of Justice issued final regulations finalizing ADA regulations, governing the use of mobility devices, including Segways®. The regulations were published in the Federal Register on September 15, 2010 and became effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. See 28 C.F.R. § 35.137 and § 36.311. Entities are allowed to consider the type, size, weight, and speed of the device, the volume of pedestrian traffic, the facility's

design and operation, and risk factors. Further requirements clarify what kind of inquiries can be made in making such a modification. While these regulations do not specifically apply to housing, they may be considered in addressing these issues in a housing context.

*Page 653, add to end of Notes:*

The economic downturn and budgetary challenges of funding home health care by various governmental programs has resulted in a wave of challenges to funding mechanisms for these services. The litigation involves claims that the failure to fund services in community and home-based settings is resulting in moving people to nursing homes and other institutional settings in violation of the least restrictive environment principle. See e.g., *A.H.R. v. Washington State Health Care Auth.*, 52 Nat'l Disability L. Rep. ¶ 99 (W.D. Wash. 2016) (granting preliminary injunction requiring state health care authority to take necessary action to ensure that infants and toddlers with complex medical needs to receive private duty nursing; failure to receive that care may result in noncompliance with ADA integration mandate); *M.A. v. Norwood*, 133 F. Supp. 3d 1093 (N.D. Ill. 2015) (allowing claim to proceed under ADA and Rehabilitation Act regarding provision of in-home nursing services for children receiving Medicaid services); *M.R. v. Dreyfus*, 767 F. Supp. 2d 1149 (W.D. Wash. 2011) (claim that across-the-board reduction in state Medicaid program that provided for in-home personal care services violated ADA); *Pitts v. Louisiana Department of Health*, 2011 WL 2193398, 43 Nat'l Disability L. Rep. ¶ 138 (M.D. La. 2011) (granting class certification to individuals in state Medicaid program claiming that state cuts had an impact on the integration mandate; individuals were seeking long term personal care service); *Haddad v. Dudek*, 784 F. Supp. 2d (M.D. Fla. 2011) (allowing claims to go forward by Medicaid recipient claiming failure to provide home and community-based health care under Rehabilitation Act and ADA); *Marlo M. v. Cansler*, 679 F. Supp. 2d 635 (E.D. N.C. 2010) (involving termination of funds for home-based care and services for adults with developmental disabilities or mental illnesses based on adverse impact on least restrictive environment); *Duffy v. Velez, Medicare & Medicaid*, 2010 WL 503037 (D.N.J. 2010) (denying dismissal of Title II suit by individual seeking home-based medical benefits; denial based on monthly income which was \$10 too high; would have placed him in a more restrictive, less integrated institution); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009) (cuts in ADHC program likely to create serious risk that adults with disabilities would be institutionalized). See also *Disability Rights New Jersey, Inc., v. Commissioner, New Jersey Department of Human Services*, 796 F.3d 293 (3d Cir. 2015) (challenging policy of forcible medication of individuals involuntarily committed in state psychiatric hospitals in non-emergency situations; claim involved the right to a pre-medication judicial process which was found not to be a service, program, or activity of the state).

## **F      ENFORCEMENT**

*Page 654, add new text to end of the chapter:*

Although the case did not involve individuals with disabilities, a 2015 Supreme Court decision will have impact on housing cases. The decision addressed practices that have racially disparate impact. In *Texas Department of Housing and Community Affairs v. Inclusive Communities, Project, Inc.*, 576 U.S.\_\_\_\_(2015), the Court held that disparate impact claims are recognized under the Fair Housing Act. Maintaining a disparate impact analysis can be critical to enforcement in disability discrimination cases because individuals with disabilities are often adversely affected not by intentional discrimination but indirectly by physical and policy barriers.

## **Chapter 9 HEALTH CARE AND INSURANCE**

### **A. HEALTH CARE AND INSURANCE**

*Page 655, add to second paragraph*

“Obamacare” or the Patient Protection and Affordable Care Act (“ACA”) has improved this situation considerably by attaining insurance for twenty million people, but there are still issues concerning coverage and availability.

### **B. NONDISCRIMINATION IN HEALTH CARE SERVICES**

*Page 674, replace Note 4 with the following:*

**4.** *National Health Care Reform.* There was no question that the country needed health care reform by the time President Obama took office. Nearly 47 million persons lacked insurance, and, therefore, found it difficult to secure health care. President Obama made health care reform one of the primary objectives of his presidency. The Patient Protection and Affordable Care Act (“Obamacare”) was enacted March 23, 2010 and subsequently survived two challenges before the U.S. Supreme Court. People fear the high cost of the health care reform and potential governmental control over health care decisions. One of the greatest fears was that the government would intrude upon end of life decisions, requiring people who are old, sick and disabled to end their lives. While there is little support for this fear in the ACA, rationing of health care is an important issue to discuss. In effect, rationing of health care already occurs. Those who do not have health insurance generally do not get the care they need. A system that covers everyone will necessarily ration care, some say, or otherwise become prohibitively expensive. See Peter Singer, *Why We Must Ration Health Care*, NY TIMES (July 19, 2009). Others argue that cost cutting measures that change how health care is delivered in less expensive and more effective ways are viable alternatives to rationing. See Atul Gawande, et al., *10 Steps to Better Health Care*, NY TIMES (Aug. 13, 2009).

Persons with disabilities have an important stake in the outcome of the health care reform because of their need for medical services. Disability advocates argued that health care reform is necessary, but they urged federal legislators to amend Medicaid to remove its institutional biases. That is, many persons with disabilities can get benefits under Medicaid only if they are living in institutional settings. Advocates argue that community-based care would be superior and less expensive. Thus, advocates urged Congress to pass the Community Living Assistance Services and Supports Act (CLASS) and the Community Choice Act, which would give support to families with persons with disabilities for national insurance without forcing them into poverty to collect Medicaid,

and would remove the institutional bias of Medicaid. They encouraged that these acts be incorporated into health care reform. See *Health Care Reform: Key Disability Issues*, <http://www.thearc.org/NetCommunity/Document.Doc?id=1585>.

President Obama signed into law in March 2010, the Patient Protection and Affordable Care Act (“Obamacare” or “ACA”). Attorneys General of several states joined to challenge the constitutionality because of the provision that requires Americans to buy health insurance (the “individual mandate”). In *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_, 132 S. Ct. 2566 (2012), the Supreme Court held that the individual mandate was unconstitutional under the Commerce Clause and Necessary and Proper Clause powers, but upheld the individual mandate as constitutional under Congress's taxing power. The Court also held that the provision of the Affordable Care Act that significantly expanded Medicaid was an invalid exercise of Congress's spending power because it coerced the states to either accept the expansion or lose existing Medicaid funding. Subsequently, the Supreme Court rejected another challenge to the ACA. See *King v. Burwell*, 576 U.S. \_\_\_ (2015) (holding that the tax credits for buying insurance under the ACA apply to both the exchanges established by the states and those established by the federal government when states refused to operate such exchanges).

See Jessica L. Roberts, *Health Law as Disability Rights Law*, 97 MINN. L. REV. 1963 (2013) which addresses health care access for individuals with disabilities and Mary Crossley, *Disability Cultural Competence in the Medical Profession*, 9 J. HEALTH L. & POLY 89 (2015).

## **C ARCHITECTURAL BARRIERS AND REASONABLE ACCOMMODATION**

*Page 699, add to Note 1.*

On July 23, 2010, the Department of Justice issued final regulations effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. One of the issues addressed in the revised regulations is the obligation regarding effective communication. The new regulations provide that the obligation extends to companions of individuals with disabilities. The guidance addressed the need to make an individualized assessment based on nature, length, and complexity of the communication and the context. Individuals with disabilities should generally be consulted about the type of aid, but the public accommodation ultimately has the decision so long as it is effective. The regulations clarify that an individual is not required to bring another individual to interpret nor rely on an adult accompanying the individual to interpret. Exceptions are allowed in appropriate emergency situations. 28

C.F.R. § 35.160 and § 36.303(c). The Title II regulations further specify requirements regarding public entities using video remote interpreting services including quality of the equipment and interpreters and qualifications of users of the technology. 28 C.F.R. § 35.160(d).

*Page 700, add to Note 3.*

In 2013, the Justice Department reached five settlements to remedy alleged violations of the ADA. The agreements resolve allegations that five health care providers – including a hospital, skilled nursing facilities, a rehabilitation center, and a doctor’s office -- violated the ADA by failing to provide effective communication to people who are deaf or have hearing loss in the provision of medical services. For information on these settlements see the Department of Justice’s [\*Barrier-Free Health Care Initiative\*](#), a partnership of the Civil Rights Division and U.S. Attorney’s offices across the nation, to target enforcement efforts on a critical area for individuals with disabilities, by accessing the Department of Justice ADA website at [ADA.gov](#).

*Page 700, add to Note 4.*

4. Department of Justice ADA regulations, effective March 15, 2011, amend both Title II and Title III regulations. Included in the revised regulations are provisions relating to physical design generally and specifically to dispersal of accessible patient bedrooms in medical care facilities, 28 C.F.R. § 36.406(g). 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III).

Other provisions give guidance regarding use of automated-attendant system (such as voice mail and messaging) and requires that systems must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs or other FCC-approved relay systems. 28 C.F.R. § 35.161.

*Page 709-10, add to Note 2.*

Of course, the Patient Protection and Affordable Care Act (“Obamacare” or the “ACA”) has made inroads into the problems that had not been solved by the MHPA and the MHPAEA. Here is an outline of the coverage by all three of these acts, and an explanation of the problems still existing:<sup>1</sup>

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<sup>1</sup> Thank you to Stacey Tovino, Lehman Professor of Law and Director of the Health Law Program at William S. Boyd School of Law, UNLV, for explaining this complicated subject and for creating this outline.

## 1. MHPA (1996).

1.1 This statute regulated only large group health plans that voluntarily offered mental health benefits in addition to physical health benefits.

1.2 The regulated large group health plans mentioned in 1.1 were required to ensure parity in terms of lifetime and annual spending limits between those voluntarily offered physical health benefits and voluntarily offered mental health benefits. Thus, it would be a violation of MHPA for a large group health plan, for example, to have a \$1 million lifetime spending cap on voluntarily covered cancer care, and a \$10,000 lifetime spending cap on voluntarily covered major depression care.

1.3 The MHPA did not regulate small group health plans or individual health plans or any other health plans. Therefore, it would be perfectly legal for a coffee shop with 10 employees to have good (high) physical health insurance benefits and bad (low) or no mental health benefits.

1.4 The MHPA did not require regulated large group health plans to offer any mental health benefits. (Since it doesn't regulate small group plans or individual plans, it also therefore did not require small group plans or individual plans to offer any mental health benefits.) Thus, it would be legal under the MHPA for a regulated large group plan (and of course a non-regulated small group plan or individual plan, that isn't regulated at all under the statute) to only offer physical health insurance benefits (e.g., cancer, pregnancy) but no mental health insurance benefits (e.g., depression, addiction).

## 2. MHPAEA (2008).

2.1 This statute was an improvement on the MHPA, but, like the MHPA, it only regulated large group health plans that voluntarily offered mental health benefits in addition to physical health benefits.

2.2 Those regulated large group health plans under the MHPAEA had to ensure parity in terms of financial requirements (e.g., deductibles, copayments, co-insurance amounts) and treatment limitations (e.g., inpatient day limitations, outpatient visit limitations) between offered physical health insurance benefits and offered mental health insurance benefits. Therefore, it would be a violation of MHPAEA for a regulated large group health plan to have a \$500 deductible for cancer care but a \$1,000 deductible for depression care. It would also be a violation of MHPAEA for a regulated large group health plan, for example, to cover 365 inpatient hospital days for cancer care but only 10 inpatient hospital days for suicide prevention.

2.3 The MHPAEA, like the MHPA, did not regulate small group health plans or individual health plans or any other health plans. Therefore, it would be legal, for example, for a coffee shop with 10 employees to have good (high) physical health insurance benefits and bad (low) or no mental health benefits.

2.4 The MHPAEA, like the MHPA, did not even require regulated large group health



plans to offer any mental health benefits. (Since it doesn't regulate small group plans or individual plans, it also, therefore, did not require small group plans or individual plans to offer any mental health benefits.) Therefore, it would be legal under the MHPAEA for a regulated large group plan (and of course a non-regulated small group plan or individual plan) to offer only physical health insurance benefits (e.g., cancer, pregnancy) and no mental health insurance benefits (e.g., depression, addiction).

### 3. ACA (2010)

3.1 The ACA was designed to fill the gaps in coverage under the MHPA and the MHPAEA. The ACA extended the parity requirements in the MHPA and the MHPAEA to individual and small group plans.

3.2 In addition, the ACA requires individual and small group plans to offer mental health and substance use disorder benefits. This is extremely important because it is the first time in history that these benefits were required by federal law. Under the ACA, this is called a "mandatory insurance benefit."

3.3 Unfortunately, this provision that makes mental health and substance use disorder benefits mandatory in individual and small group plans does not apply to large group health plans (e.g, the health plans of Target, Wal-mart, and other large corporations etc.) self-insured health plans, and grandfathered health plans (i.e., health plans that were in effect as of March 23, 2010, and that have not substantially increased cost sharing or substantially lowered insurance benefits). In the state of Nevada, for example, less than 10% of individuals have their insurance through an individual or small group health plan. Therefore, only 10% of Nevadans receive the new mandatory mental health and substance use disorder insurance benefits and other essential health benefits (EHBs). Of course, large employers may voluntarily offer these benefits, and many do, but they are not required to do so. For further explanation and an argument for the extension of the ACA provision requiring mental health and substance abuse coverage to large group health plan market, the grandfathered health plan market, and the self insured health market, see Stacey A. Tovino, *A Proposal for Comprehensive and Specific Essential Mental Health and Substance Use Disorder Benefits*, 38 AMERICAN J.L. & MED. 471 (2012); Stacey A. Tovino, *All Illnesses Are (Not) Created Equal: Reforming Federal Mental Health Insurance Law*, 49 HARVARD J. LEGIS. 1 (2012).