
Disability Rights

In This Issue

November
2002
Volume 50
Number 6

United States
Department of Justice
Executive Office for
United States Attorneys
Office of Legal Education
Washington, DC
20535

Guy A. Lewis
Director

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The United States Attorneys'
Bulletin is published pursuant
to 28 CFR § 0.22(b)

The United States Attorneys'
Bulletin is published bi-
monthly by the Executive
Office for United States
Attorneys, Office of Legal
Education, 1620 Pendleton
Street, Columbia, South
Carolina 29201. Periodical
postage paid at Washington,
D.C. Postmaster: Send
address changes to Editor,
United States Attorneys'
Bulletin, Office of Legal
Education, 1620 Pendleton
Street, Columbia, South
Carolina 29201

Managing Editor
Jim Donovan

Assistant Editor
Nancy Bowman

Internet Address
[www.usdoj.gov/usao/
eousa/foia/foiamanuals.html](http://www.usdoj.gov/usao/eousa/foia/foiamanuals.html)

Send article submissions to
Managing Editor, United
States Attorneys' Bulletin,
National Advocacy Center
Office of Legal Education
1620 Pendleton Street
Columbia, SC 29201

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Foreword

Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

Only a few days after his inauguration, President Bush announced his New Freedom Initiative, a blueprint for tearing down the remaining barriers to equality for this nation's fifty-four million Americans with disabilities. It acknowledges the progress that has been made since the enactment of the Americans with Disabilities Act (ADA) in 1990 opening up American society for full participation by people with disabilities, but recognizes that there is still a long way to go before equal opportunity is achieved.

The New Freedom Initiative is grounded on deeply troubling and stubborn realities of American life, even in the new millennium.

First, Americans with disabilities still have less opportunity for meaningful educational achievement than do those without disabilities. For example, one out of five adults with disabilities has not graduated from high school, compared to one of ten adults without disabilities. National graduation rates for students who receive special education services have remained at 27 percent for the past three years, while rates are about 75 percent for students who do not rely on special education.

Second, Americans with disabilities are poorer and more likely to be unemployed than those without disabilities. Astoundingly, in 1997, over one-third of adults with disabilities lived in households with an annual income of less than \$15,000, compared to only 12 percent of those without disabilities. Unemployment rates for working-age adults with disabilities have been at about 70 percent for well over a decade, while rates of unemployment are significantly lower for working-age adults without disabilities.

Finally, while even one person being left out or left behind is too many, it is troubling that Americans with disabilities continue to remain outside the economic and social mainstream of American life at such strikingly disproportionate

rates. For example, 71 percent of people without disabilities in this country own homes, but fewer than 10 percent of those with disabilities do. Computer usage and Internet access for people with disabilities is half that of people without disabilities. People with disabilities vote at a rate that is 20 percent below voters without disabilities.

Clearly there is much work to be done. President Bush, through the New Freedom Initiative, has committed this Administration to getting the job done. The New Freedom Initiative pledges action to integrate Americans with disabilities into the workforce, to increase educational opportunities, and to expand the availability of accessible housing and transportation. It promises to broaden access to assistive technology. It supports changing laws to improve access to polling places and providing ballot secrecy for people with disabilities. It pledges swift implementation of the Supreme Court's *Olmstead v. LC ex rel. Zimring*, 527 U.S. 581 (1999) decision, providing services for individuals with disabilities in the most integrated, community-based settings. Also, it calls for ensuring accessibility of mental health services in communities where people are deaf, hard of hearing, or who have speech impairments.

Vital to these efforts is the New Freedom Initiative's call for full enforcement of the Americans with Disabilities Act. The broadest possible implementation of the ADA is one of the top priorities of the Civil Rights Division. Our partnership with U.S. Attorneys' Offices throughout the country has been instrumental in our successes to date and is one of our greatest resources for the work to come. The U.S. Attorneys' Offices, together with the staff of the Civil Rights Division that concentrate on disability rights work, the Disability Rights Section, the Housing and Civil Enforcement Section, and the Special Litigation Section, are literally changing the face of America.

The collection of articles in this issue of *U.S. Attorney Bulletin* brings to life some of the notable successes of this partnership and looks at a few of the difficult legal challenges that we face

as we move forward. You will find fascinating case studies on enforcement of the ADA and the Fair Housing Act as well as articles addressing the definition of disability and other important issues that have arisen since the ADA was enacted twelve years ago.

The Americans with Disabilities Act and the other statutes enforced by the Civil Rights Division reflect some of America's highest aspirations: to become a society that provides equal justice under law; to become a society that effectively protects the most vulnerable among us; and to become a society whose citizens not only protect their own individual freedom and liberty, but champion the individual freedom and liberty

of their neighbors who may be different from them. It is a great privilege to be involved in this work and to be working with you to make these aspirations a reality. ❖

ABOUT THE AUTHOR

❑ **Ralph F. Boyd, Jr.** serves as the Assistant Attorney General for Civil Rights and heads the Civil Rights Division of the U.S. Department of Justice. Prior to his appointment, he was a partner in the Trial and Litigation Department of the Boston law firm of Goodwin Procter LP. He also previously served as Assistant United States Attorney in the Major Crimes Unit of the U.S. Attorney's Office in Boston.✉

The U.S. Attorney Program for Americans with Disabilities Act Enforcement – A Series of Case Studies

In 1996, the Attorney General instituted the U.S. Attorney Program for ADA Enforcement, incorporating U.S. Attorneys' Offices into the Department's nationwide ADA enforcement efforts. Since that time, many U.S. Attorneys' Offices have joined this program, received training in ADA requirements, and taken the lead on ADA cases. U.S. Attorneys' Offices have handled hundreds of ADA investigations and lawsuits across the country, setting legal precedent, reaching formal and informal settlements, and establishing vital contacts between the Department and the local community, including persons with disabilities and business and municipal entities. They have resolved matters small and large – from giving a wheelchair user in a small town access to attend town meetings, to suing child care providers for excluding a child with HIV, to obtaining an injunction against a local zoning authority that refused to grant a permit to a downtown

social/counseling center for persons with mental illness. United States Attorneys' Offices accomplishments have included suing a fast-food restaurant for ousting a woman who uses a service animal and modifying a chain of over 700 restaurants so as to be accessible to people with a range of disabilities.

The following are a few examples of successful ADA cases led by Assistant U.S. Attorneys. They provide a sample of the broad range of issues that arise under the ADA. Some are obviously critical, such as a deaf couple's ability to communicate with their obstetrician during a high risk pregnancy or access to emergency 9-1-1 services for persons with hearing or speech impairments. Others, while perhaps less urgent, are just as fundamental to mainstream life. For example:

- a wheelchair user being able to attend a baseball game at Yankee Stadium with his

children and see over the people who stand in front of him during exciting moments in the game;

- a person with a mild developmental disability being able to obtain car insurance, so that she can commute to work and take care of her family;
- wheelchair users being able to attend the famous New Orleans Jazz Fest without having their wheels get stuck in the pervasive Louisiana mud, and persons with visual impairments being able to obtain maps and brochures about the Jazz Fest in formats they can use;
- persons with all types of disabilities being able to enjoy an international cultural exhibit;
- a wheelchair user being able to use the restroom at a Burger King along the road.

The following case studies also show a range of approaches and strategies that can be utilized in resolving these matters and some of the issues that can complicate them. The Assistant U.S. Attorneys who handled these matters have literally paved the way for persons with disabilities and have shown how instrumental the power and influence of U.S. Attorneys is in implementing federal mandates in their districts.

AUSAs who are interested in participating in the U.S. Attorney Program for ADA Enforcement should contact Roberta Kirkendall at (202) 307-0986 (roberta.kirkendall@usdoj.gov) or Bebe Novich at (202) 616-2312 (bebe.e.novich@usdoj.gov).

United States v. York Obstetrics & Gynecology, P.A., 2001 WL 80082 (D. Me.): Effective Communication in Health Care

Jim Moore

Assistant United States Attorney District of Maine

In 1999, the U.S. Attorney's Office for the District of Maine received a complaint from Raymond and Megan McLaren, a young, married couple who alleged they had suffered disability-based discrimination because their treating obstetricians in York, Maine had failed to provide them with the assistance of a sign language interpreter. Investigation of their complaint revealed that Mr. and Mrs. McLaren were not completely deaf. They both had a small amount of residual hearing and could "lip read" to a very limited extent. While the McLarens' requests to the obstetrics clinic for interpreters were corroborated by letters and several witnesses, the obstetricians' claim that Mrs. McLaren had waived her ADA rights would pit the credibility of the McLarens against highly-educated physicians, authoritarian figures who might carry greater weight with a jury.

Should the United States file an ADA suit on behalf of Mr. and Mrs. McLaren? Further investigation revealed that the help of an interpreter was denied for prescheduled appointments during a four to five month period of pregnancy that was complicated, at an early stage, by loss of a twin and later by gestational diabetes. The expectant mother was placed on a special diet to control the diabetes, but she had great difficulty understanding the diet. Since the information that needed to be communicated to the McLarens was complex and the appointments took place over a lengthy period of time and involved a matter of great importance, the United States Attorney for Maine decided in 1999, after a failure to achieve accommodation through negotiations, to seek authority from the Civil Rights Division to file a Complaint alleging the clinic had violated the ADA. In its Complaint, the United States alleged a sign language interpreter was necessary to ensure effective communication and in order for Mr. and Mrs. McLaren to have an equal opportunity to benefit from prenatal services and make fully-informed decisions.

After the U.S. Attorney's Office filed suit on behalf of the McLarens, the couple retained private counsel and intervened as private parties. The plaintiffs' attorney had in previous years

developed an expertise in the representation of persons who are deaf and was very helpful throughout the proceedings. The addition of the plaintiffs' attorney to the case helped match the resources of the defendant clinic, which, with the help of insurance carriers, had simultaneously retained three law firms and employed six attorneys at various stages of the litigation. The United States and the private plaintiffs often filed joint motions, responses, and trial memoranda.

The case became only the second ADA suit filed by the Department of Justice to proceed to jury trial. Mr. and Mrs. McLaren testified they had great difficulty understanding the obstetricians and that they repeatedly requested the clinic to provide them with an interpreter. However, that assistance was never furnished during a four-month period in which the condition of the pregnancy deteriorated and reached a high-risk level. Witnesses from a nonprofit agency that assists people who are deaf, and from the McLarens' insurance company, testified that they repeatedly called the clinic to advise its managing physician that the law required the provision of an interpreter.

In addition to claiming that Mr. and Mrs. McLaren had agreed to receive prenatal care without the help of an interpreter, the clinic, through its physicians and nurses, asserted at trial that Mr. and Mrs. McLaren did not have disabilities because they were able to communicate without the assistance of auxiliary aids and services. Clinic personnel testified that even though the McLarens had previously used an interpreter, such assistance was not necessary because the couple had at all times thereafter appropriately responded to their questions during appointments without the presence of an interpreter. The obstetricians claimed that there was no need to even communicate with use of written notes because Mr. and Mrs. McLaren were able to hear them and read their lips.

Three expert witnesses were very helpful in establishing the McLarens' need for a sign language interpreter. The first expert who testified for the United States was an obstetrician. This expert explained the importance of communication between an obstetrician and her patient during a pregnancy, the information that

had to be communicated between the doctor and patient, the reasons for communicating such information, and the consequences of ineffective communication. The obstetrician also discussed the role of the expectant father in obstetrical care and the benefits to the expectant mother and the fetus of having the father involved in such care. We were very fortunate to discover a highly qualified expert who was willing to testify against other physicians who practiced in the same specialty within the same region of Maine.

Since Mr. and Mrs. McLaren had some residual hearing and were not completely deaf, the U.S. Attorney's Office employed an audiologist who testified that Mrs. McLaren had bilateral profound hearing loss and that she had an awareness of speech with the assistance of hearing aids but that she was not able, even with the use of hearing aids, to discriminate speech without visual cues. The audiologist added that Mr. McLaren had bilateral sensorineural hearing loss and that his speech recognition, with the assistance of his hearing aid, was extremely poor at conversational speech intensity.

The United States also introduced testimony from an internationally recognized professor of linguistics who had assessed the McLarens' modes of communication – sign language, speech, lip reading, writing, reading and gestures. The professor testified about the couple's inability to communicate effectively without an interpreter and that the couple's primary and preferred language was American Sign Language. Two interpreters who had signed for Mr. and Mrs. McLaren in medical settings at other times during the pregnancy testified about their apparent need for such assistance while the defendant relied upon testimony from physicians at other practices who described their communication with the couple in the absence of auxiliary aids.

The jury appeared to have reached a compromise verdict. While claims that Mrs. McLaren had suffered disability-based discrimination were denied, the jury returned a verdict in favor of the United States, finding that the clinic violated Title III of the Act by failing to provide the assistance of an interpreter to Mr. McLaren. In awarding Mr. McLaren a sum of \$60,000.00 in compensatory damages, the jury

concluded that the clinic intentionally chose not to provide him with the help of a sign language interpreter despite having been put on notice that the failure to provide such assistance might violate the law. The District Court also granted the request of the U.S. Attorney's Office for injunctive relief against the clinic to ensure that auxiliary aids and services would be provided to others with disabilities who visit the clinic.❖

ABOUT THE AUTHOR

❑ **Jim Moore**, the Assistant U.S. Attorney who tried the McLaren case, clerked for the Chief Judge of the U.S. District Court in the District of Kansas and was a Trial Attorney for the Torts Branch prior to 1993 when he joined the U.S. Attorney's Office in Maine.✉

Jazz Fest: Using a Positive and Creative Approach to Resolving ADA Issues

Glenn K. Schreiber
Assistant United States Attorney
Eastern District of Louisiana

"You'll catch more bees with honey than with vinegar." Anon.

"Whatever creativity is, it is in part a solution to a problem." Brian Aldiss

New Orleans is often called "the city that care forgot." Such a *laissez-faire* attitude is compounded by the usual ignorance of complex statutes, like the ADA, that one encounters in many places, not just "the Old South." When attempting to bring about change, one should always consider the attitudes, knowledge, and experience of the people with whom one will be dealing, in order to find the most effective approach to inform them of a need and to help them find the solution. You will note that I think and speak in terms of "needs" and "solutions" instead of "problems," "violations," or "remedies." I use this terminology because I find that the way

I shape my attitude greatly affects the manner in which I (a.k.a. "the Department") am received.

Jazz Fest is an excellent example of this approach making all the difference in the outcome. The Jazz Fest is an annual event presented by the New Orleans Jazz & Heritage Foundation (the Foundation) in New Orleans, Louisiana, and includes hundreds of musical performances, arts and crafts displays, and beverage/food vendors. Each year, the Foundation constructs the stages, tents, and most of the booths in which these features are made available to festival-goers, whose numbers over the past two years averaged more than 80,000 per day. The event is staged at a fairgrounds which, at other times, is used as a race track. The facility has several components. First, there is a three-story enclosed grandstand inside of which is a paddock area. A concrete apron runs in front of the grandstand along the long side of the track. The track itself has a sandy surface, while the large infield contains grass over which winding tarmac paths have been superimposed. All of the aforementioned areas are used to stage music and folklore performances, display arts and crafts shown by exhibitors chosen from across the nation, and vend food, drinks, and souvenirs of mostly local origin.



Figure 1 – Jazz Fest photo Case Study # 2

When I first approached the Foundation about performing a compliance survey, it was after I had resolved a minor dispute between the Foundation and a volunteer who complained that he could not park his wheelchair accessible van close enough

to attend the requisite orientation meeting. Having just had the ADA flung in their face, by an unpaid volunteer no less, the Foundation at first did not entertain my request with any great cheer. Because the Foundation stressed the goal of "multiculturalism," I seized upon this in my initial discussions with them and posited that persons with disabilities comprise a culture that they could serve better--with a little help from Uncle Sam. I emphasized that with so many different venues, facilities, features, and surfaces, the Foundation was not to blame for oversights or errors in making accommodations for persons with disabilities. I held out the Department as a resource, a clearinghouse for information on making places and programs more accessible, that we would tap as we proceeded through the survey process. When approached in this fashion, the Foundation and its counsel became not just cooperative, but wholly supportive of the goal of complete accessibility.

There were numerous facets to making Jazz Fest accessible. A look at the final agreement (available online at <http://www.usdoj.gov/crt/ada/nojazz.htm>) demonstrates the complexities involved. Some of the more creative solutions we devised dealt with providing accessible routes across changing surfaces. To get from the cement apron across the sandy racetrack, interlocking plastic and rubber tiles called "porta-path™" were employed, but to get from the other side of the racing surface to the infield, the Foundation constructed extra-wide planked walkways one side of which were boarded over to provide a smooth surface for wheelchairs. Connecting each walkway to the nearest tarmac path required special tar and rubber moldings set at the proper grade for a smooth landing on the permanent paths that meander through the infield.

The one area over which the Foundation gave us any resistance turned out to be the gem in the crown of their accommodation efforts. Our survey showed that persons in wheelchairs could not see the acts performing on the main outdoor stages due to the crowds around them standing up and dancing during each performance. Initially the Foundation opposed to the idea of providing a special reserved area in front of the stage for

spectators in wheelchairs, on the basis of safety, (fear of drawing the wrath of the crowd). However, the Foundation withdrew its opposition after it was pointed out that the crowds attending Jazz Fest are generally very mellow, tolerant people, and they had already reserved space in front of the stages for VIPs. In reversing their opposition, the Foundation went all out, carefully enclosing an area large enough to allow up to six persons in wheelchairs and their companions ample space to maneuver into position nearly in front of mid-stage. The reserved area also included a wheelchair accessible portable toilet, and signs placed high enough and printed large enough to be readily seen from the vantage point of a wheelchair pointing the way to the entrance of the area. This one feature easily draws the most praise annually from the disabled community and goes to the heart of the festival--making a varied assortment of music available to all listeners.

But by far the most gratifying aspect of the Jazz Fest project is the attitude with which the Foundation approaches the subject of accessibility. Its staff, headed by one of the most conscientious ADA coordinators I have ever met, continually looks for new and additional ways in which the event may be made more accessible. This year, alone, they instituted significant and effective changes in signage, accessible routes, and enforcement among the many independent artisans and vendors. This ensured easy ingress and egress to reserved accessible seating in all the performance venues and in and around the arts and crafts display areas. While many of the steps they took are not required by the letter of the ADA, they certainly achieve the spirit of the law. With the right attitude and a willingness to think "outside the box," accessibility can be significantly improved to the delight of both the public with disabilities and those to whom they look for accommodation.

NOTE: The Foundation's actions have already been appreciated by persons with disabilities who have sent letters and emails expressing their gratitude that their needs were being fully and effectively addressed. The New Orleans Jazz & Heritage Foundation also recently won recognition for its efforts from the Governor's

Office of Disability Affairs, who gave the Foundation a Distinguished Service Award.❖

ABOUT THE AUTHOR

❑ **Glenn K. Schreiber** has been an AUSA in the Civil Division in the Eastern District of Louisiana since 1985 and is the coordinator of the Employment Litigation Group in his office. He received a Special Achievement Award in 2000 for his ADA enforcement work in connection with the New Orleans Jazz and Heritage Festival.❖

Burger King Restaurants: Readily Achievable Barrier Removal in Public Accommodations

*Patrick M. Walsh
Assistant United States Attorney
District of New Hampshire*

On April 11, 2002, Burger King Company, Inc., Miami, Florida, entered into a Consent Decree with the U.S. Attorney's Office for the District of New Hampshire, and agreed to remove architectural barriers to access by persons with disabilities at seventeen of its twenty-one company-owned restaurants in New Hampshire. In a Consent Decree filed in U.S. District Court resolving the case, Burger King agreed to pay a total of \$55,000.00 in civil penalties and damages to resolve allegations that Burger King restaurants in the District restricted or prevented persons with disabilities from using the restaurants, in violation of the Americans with Disabilities Act.

Early on a Saturday afternoon in mid-October, 1999, Charles Gamer pulled into a Burger King restaurant in Dover, New Hampshire, for lunch. Gamer, an attorney from Milton, Massachusetts, was traveling through New Hampshire on the Columbus Day weekend with his family. Gamer uses a wheelchair. While at the Burger King, he tried to use the restroom. On entering the lavatory, he found that there was only one stall, and that its door was too narrow to accommodate his wheelchair. He also noticed that there was not

enough room in the stall for his wheelchair to navigate and that there were no grab bars on the side and back walls. In other words, the one and only restroom stall was not "accessible," because barriers prevented a person who uses a wheelchair from using the public restroom at that restaurant. He complained to the supervisor on duty, who advised him that there was no other public restroom available and suggested that he might try to find another restroom elsewhere in town.

As a result of his experience at the Dover Burger King, Mr. Gamer filed a complaint with the Disability Rights Section of the Department of Justice in late 1999, alleging that there were architectural barriers to access at that restaurant. In early 2000, the case was referred to the U.S. Attorney's Office for the District of New Hampshire.

The United States Attorney's Office opened an investigation and assigned the Office's ACE (Affirmative Civil Enforcement) Investigator to inspect the Burger King restaurant in Dover to determine the extent of any violations of the ADA relating to accessibility in the public areas. It was discovered that there was indeed only one men's restroom stall at that restaurant and that the dimensions were well below the minimum necessary to permit access by persons who use wheelchairs. Other violations relating to height of restroom fixtures and lack of grab bars were also noted. Minor deficiencies in the required sign configuration for accessible parking in the restaurant parking lot were also found.

There are thirty-one Burger King restaurants in New Hampshire, and a high percentage of them (twenty-one) are company-owned. Because of the large number of company-owned facilities, we decided to conduct a compliance review of other Burger King restaurants to learn whether the accessibility problems were limited to that one restaurant or whether potential ADA violations were more widespread.

Between February and September, 2000, our investigator, armed with a tape measure, a digital camera, and a checklist of the most relevant aspects of the ADA architectural standards that apply to places of public accommodation, visited twenty-one Burger King restaurants to evaluate

ADA accessibility at each site and examined each for specific accessibility deficiencies similar to those alleged in the initial Gamer complaint.

The architectural standards for places of public accommodation are set out in detail in 28 C.F.R. Part 36, Appendix A (The ADA Standards for Accessible Design). According to the ADA, the Standards apply to all new construction, defined as buildings or structures constructed for first occupancy after 1993, or older building structures that have had significant renovation since 1992. Older construction must adhere to the Standards if it is "readily achievable" to do so, *i.e.*, easily accomplishable without significant difficulty or expense. For a company like Burger King, which renovates its restaurants according to a rotation schedule, it can be quickly determined when the individual facility was built or renovated in order to determine what level of compliance is required.

Our investigation at particular restaurants focused on restroom compliance (door width and turning radius, stall door width and stall floor size, placement of fixtures and grab bars), parking designations, and food service queues. Of the twenty-one surveyed restaurants, seventeen were found to have significant compliance inadequacies, including restrooms that did not have at least one stall large enough to accommodate a wheelchair, restroom stalls that had no grab bars, restroom entry ways and stall doors that were too narrow to accommodate wheelchair passage, paths in the restaurant's seating area that were too narrow for wheelchair use, a lack of designated parking spaces, and inadequate accessible parking signs.

As an example, the investigator found that one restaurant had several apparent violations:

- 1) there were no signs identifying accessible parking spaces in its lot;
- 2) the restroom stall floor space was too small to accommodate a wheelchair, in violation of the architectural standards, which require a width of sixty inches and a depth of fifty-nine inches. Standards 4.17.3;

- 3) the narrow stall door presented an architectural barrier to access because it was less than thirty-two inches wide. Standards 4.17.5; and,

- 4) the path of travel in the rest room was too narrow to allow passage of a wheelchair, due to a privacy wall.

We found that a site visit to the various restaurants disclosed different accessibility problems at each location, yet almost all facilities had some accessibility issues in common, such as the height of sinks and other plumbing fixtures, or appropriate signs and painted marks designating accessible parking spaces. In New Hampshire, the long, snowy winters can take their toll on painted stripes on most parking lots, and an errant snowplow clearing the same parking lot can take out a sign that marks the accessible parking spaces. In most cases, the minimum spatial requirements can be found in the regulations and the Standards, which contain both written descriptions and diagrams of acceptable plumbing fixtures and applicable measurements, among other things.

The investigator's detailed and thorough report was furnished to Burger King and was used as a benchmark for required remedial work at the restaurants. It also formed the basis for the terms of ultimate settlement.

Negotiations centered on the necessary ADA-mandated work at each facility. A study of the floor plans for each restaurant indicated that it was readily achievable to remove barriers in the buildings that were constructed before 1992 and, therefore, all affected restaurants were required to meet the statutory requirements for accessibility as defined in the ADA and the Standards.

Two primary issues remained: (1) whether a civil monetary penalty would be assessed (and, if so, how much?); and, (2) what specific modifications to each restaurant would be made to bring each into ADA compliance.

In addition, we made an early determination that if the case were resolved by agreement, every aspect of the settlement would be incorporated into a Consent Decree, which would be filed with the Court, preferably at the time of the filing of the Complaint in U.S. District Court. This

decision caused extensive involvement and review by one of the Department's architectural consultants, Ralph Martinez, who examined every proposed drawing, sketch, and blueprint submitted by Burger King to ensure that the smallest detail was taken into account. Was there enough clear floor space and an adequate turning radius in the new configuration offered by the company? Did exterior doors and restroom stall doors swing open in such a way as to interfere with travel? Were partitions, aisles, and passageways clear, and wide enough to accommodate those who use wheelchairs? Were accessible parking spaces level and properly designated by signs and painted markings? Were they close to an accessible entrance? These and many other analyses were made by our office and the architectural consultants as Burger King presented their plans for renovations to bring the restaurants into ADA compliance.

Ultimately, the company agreed to pay \$50,000 (virtually the statutory maximum) to the United States as a civil penalty for the barriers to accessibility at their New Hampshire restaurants. The company also agreed to pay Charles Gamer \$5,000, "...as a civil monetary penalty for his injuries suffered at the Burger King restaurant in Dover, New Hampshire, as a direct result of the defendant's failure to remove barriers to accessibility for persons with disabilities...."

In addition to the Consent Decree, which was filed concurrently with the Complaint, the parties submitted to the U.S. District Court a detailed description of the required modifications to be made to each of the seventeen Burger King restaurants that were found to have barriers to access. Blueprints and architectural drawings were included for several locations that needed extensive work.

Our office learned that by making a detailed and comprehensive record of ADA deficiencies at the restaurants, we had an objective threshold to which we could refer as we reviewed those barriers to access with Burger King. By filing a Complaint and Consent Decree in District Court, there was a public record of the enforcement action, and as important, a set of documents filed with the Court that specified the necessary renovation work to bring those locations into

ADA compliance as well as a timetable for completion. This was especially important in the event a dispute arose in the future concerning the company's remedial action.❖

ABOUT THE AUTHOR

❑Patrick M. Walsh has been an Assistant U.S. Attorney for the District of New Hampshire since 1989. Mr. Walsh joined the Department of Justice in 1981 as a Special Attorney in the Narcotics Section. He also served in the Organized Crime & Racketeering Section in Boston and as Deputy Director of the Criminal Division's Asset Forfeiture Office.⌘

United States v. Warrior Insurance Group: Discrimination Based on Perception

*Mark R. Niemeyer
Assistant United States Attorney
Southern District of Illinois*

United States v. Warrior was the first lawsuit brought by the United States against an insurance company for violation of the Americans with Disabilities Act (ADA). The suit was resolved by Consent Decree on May 30, 2000, in the United States District Court for the Southern District of Illinois. The monetary settlement amount contained in the Consent Decree is the largest to be given to an individual plaintiff in any Title III ADA action.

This ground-breaking lawsuit involved a complaint by the United States against Warrior Insurance Group d/b/a Gallant Insurance Company d/b/a Valor Insurance Company (Warrior) alleging violations of Title III of the ADA. Specifically, the United States alleged that Gallant Insurance Company (Gallant), Warrior's subsidiary, refused to pay the auto theft claim of a woman it insured because it believed her to have a mental disability, although Gallant knew the woman could safely operate an automobile.

Gallant, then rescinded her insurance policy completely (again, based upon her perceived mental disability), leaving her without an automobile or automobile insurance.

In the Consent Decree, Warrior agreed to pay the woman and her attorney \$175,000.00, and to pay the United States \$25,000.00 in satisfaction of the United States' claim for a civil penalty. Warrior further agreed to modify its guidelines, insurance applications, and related documents, to dictate that it will not discriminate on the basis of disability. To demonstrate its compliance, Warrior made periodic reports to the U.S. Department of Justice for two years.

The case involved a woman with mild mental retardation. She applied for and received automobile insurance with Gallant. In her insurance application, the woman did not indicate that she had a mental disability (the application asked about "medical disability" and the woman did not interpret that to include her mental disability). The woman's car was subsequently stolen, and she made a claim with Gallant. During the course of the claims investigation, Gallant discovered that the woman was receiving Supplemental Security Income for her disability. Gallant, then, completely rescinded the woman's policy (and did not pay her claim) because she failed to disclose her mental disability (even though the woman was able to provide a report from a physician attesting to her ability to drive). Gallant stated that, if such a physician's report is provided, it would not refuse to insure individuals with disabilities nor would it charge higher rates for such individuals. Therefore, there was simply no reason, other than discrimination, for Gallant to have rescinded the woman's insurance policy.

This case was greatly affected by the discovery process and, more specifically, Gallant's failure to comply with discovery requests and orders. Throughout the discovery period, Gallant denied the existence of training and policy manuals. Gallant further denied the existence of a bonus structure that rewarded adjusters for claim denial or low payout. Through investigation and information sharing with other attorneys involved in separate suits (state court bad faith claims) against Gallant, the existence of manuals and the bonus structure was discovered.

The Court had previously entered a sanctions order for Gallant's failure to produce various other documents prior to depositions. Upon discovery of the manuals and bonus structure, plaintiff, again, moved for sanctions. The threat of potentially substantial sanctions, in addition to evidence of Gallant's encouragement of claim denial, brought a previously unwilling Gallant to the settlement table.

The United States' case did have complicating factors that made settlement desirable. The woman's mental impairment is not severe, and she likely did not meet the ADA definition of an individual with a disability. As such, the United States' main theory was that Gallant discriminated based upon its perception of the woman as disabled. It was difficult to argue exactly which major life activity was perceived to be substantially impaired. The United States alleged major life activities of driving, thinking, and caring for oneself, but did not have any direct evidence of Gallant's perceptions regarding the complainant. While there is some support to the contrary, the Court may not have agreed that driving is a major life activity.

Gallant raised the Safe Harbor provision of section 501(c) of the ADA, 42 U.S.C. § 12201(c), as well as the McCarran-Ferguson Act, 15 U.S.C. 1012(b). The McCarran-Ferguson Act, as discussed in *Doe v. Mutual of Omaha Insurance Company*, 179 F. 3d 557 (7th Cir. 1999), precludes federal law from preempting state insurance laws or regulations unless such federal law specifically pertains to insurance. The "safe harbor" provision protects an insurance company's administration of an insurance risk. The United States refuted Gallant's argument, stating it made no allegations regarding the content of any insurance policy or the administration of risk, and, thus, *Doe* did not bar the United States' Title III action. Rather, the United States challenged the rescission and consequent complete refusal to insure the woman based upon her disability. In other words, the United States alleged that defendant had denied the woman access to its good/service (insurance) because of her mental disability, in violation of the ADA as interpreted by the *Doe* case.

Finally, in her application, the woman failed to disclose a prior claim for the theft of an automobile. Gallant argued that the misrepresentation was intentional and material as her rates would have been raised because of the prior theft. Such a position is a sound, nondiscriminatory reason for rescission if, in fact, rates would have been raised because of the prior theft. However, the only time the prior theft was voiced as a reason was in depositions. The rescission letter and request, as well as responses to the United States' inquiries, did not include the nondisclosure of the prior theft as a reason. It seems, then, the prior theft was being used as a pretext, even though information about the theft was received in the claims file prior to the rescission. ❖

ABOUT THE AUTHOR

❑ **Mark R. Niemeyer** has served as an AUSA in the Civil Division for the Southern District of Illinois for four years. In addition to ADA enforcement, AUSA Niemeyer handles the defense of employment discrimination, FTCA, prisoner, and Social Security cases. Prior to service as an AUSA, Niemeyer worked in a defense litigation law firm and as an assistant state prosecutor in St. Louis. ❖

United States v. New York Yankees, 108 F. Supp. 2d 258 (SDNY 2000): Breaking Down Barriers to America's Pastime

*Sara L. Shudofsky
Deputy Chief, Civil Division
Southern District of New York*

In January 1999, the United States Attorney's Office for the Southern District of New York intervened in a private lawsuit brought against the New York Yankees alleging that the Yankees discriminated against people with disabilities at Yankee Stadium. The government also sued the

City of New York, which owns the Stadium. This lawsuit was the first brought by the Justice Department under the ADA against a professional sports franchise. The case was vigorously litigated through discovery and motions practice for almost a year, as the parties prepared for a trial to determine what constitutes readily achievable barrier removal in connection with a deteriorating seventy-seven-year-old structure located in one of the world's richest sports markets. The case was handled by Assistant United States Attorneys Robert W. Sadowski, Glenn C. Colton, Irene Chang, and Sara L. Shudofsky. In December 1999, on the eve of trial, the parties reached a settlement of the case.

Prior to the resolution of the government's lawsuit, a total of only forty-four pairs of wheelchair and companion seating locations were provided at Yankee Stadium, and most of them had obstructed sightlines whenever spectators in front of the locations stood to watch certain plays in a game. Under the terms of the Stipulation and Order of Settlement, defendants agreed to increase the number of wheelchair and companion seating locations up to 400 pairs of seating locations, including many locations with unobstructed views over standing spectators.



Figure 2 – Yankees Photo Case Study # 5

The Stipulation also required defendants to disperse the new locations throughout the lower levels of the Stadium (prior to each season up to and including the season commencing in 2006, the defendants are required to install a specified number of additional seating locations). The

Stipulation also required the defendants to build two entirely new seating sections – one in a location near Monument Park (a museum area commemorating Yankee greats) in left field, and the other in an area behind right center field. In order to achieve unobstructed views from the new seating section near Monument Park, the defendants replaced the 8-foot, 6-inch-high padded outfield fence that used to separate Monument Park from the field with a 3-foot-high padded wall with a series of glazed panels above it. Fans with disabilities are enjoying both of these seating sections today, and the areas are readily visible on New York Yankee telecasts.

In compliance with the ADA's requirement that people with disabilities be offered a choice of admission prices comparable to those available to all other fans, the Yankees now sell tickets to both regular season and post-season games for almost all of the wheelchair seating locations at the three lowest ticket price levels provided at the Stadium. Fans with disabilities can also purchase regular season and post-season tickets through all of the same methods afforded to others, including Ticketmaster and internet websites.

The defendants have also modified the following components within the Stadium to provide accessibility to fans with disabilities:

- (1) exterior and interior routes, doors, and signs;
- (2) service areas such as restrooms, telephones, drinking fountains, concession areas, elevators, and ticket windows;
- (3) restaurants and pubs;
- (4) luxury suites and lounges;
- (5) fire alarms;
- (6) press areas;
- (7) Monument Park; and
- (8) parking facilities.

A total of 300 designated aisle seats that have no armrests, or are equipped with folding or removable armrests, are also dispersed throughout the Stadium.

As the U.S. Attorney stated when the settlement was announced, "Yankee Stadium is

one of the most famous stadiums in the world, home to the franchise that has been dubbed the 'team of the century.' Today's agreement ensures that, as we enter the next century, people with disabilities will have an equal opportunity to enjoy America's pastime at this unique landmark." ❖

ABOUT THE AUTHOR

❑ Sara L. Shudofsky was Chief of the Civil Rights Unit at the U.S. Attorney's Office during the Yankee Stadium litigation. She is now a Deputy Chief of the Civil Division. Robert W. Sadowski now serves as the Office's Health Care Fraud Coordinator. Glenn C. Colton serves in the Narcotics Unit of the Criminal Division. Irene Chang has since left the United States Attorney's Office. ❖

***Ferguson v. City of Phoenix,* 931 F. Supp. 688 (D. Az. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998): Integrating Systems for Deaf Persons into Emergency Services**

Robert Mather
Senior Trial Attorney
Disability Rights Section

Ron Gallegos
Deputy Chief
District of Arizona

In consolidated cases, three private plaintiffs who are deaf alleged in 1996 that the city of Phoenix operated its 9-1-1 emergency service in a way that discriminated against persons who use telecommunications devices for deaf persons (TDD). A TDD is a device used with a standard telephone to communicate with persons who are deaf, hard of hearing, or who have speech impairments, by typing and reading communications. It is similar to the

teletypewriters used by Western Union to "wire" transmissions or instant messaging via the internet. Most simple TDDs are roughly the size of a laptop computer, and the user can connect one to a standard telephone by placing the phone handset into couplers on the TDD. The code is sent as audible tones similar to those used by facsimile machines. Conversing in this manner is very similar to a spoken conversation, except that it is typed and read, instead of spoken and heard. A TDD user types his or her conversation, which is read on a display by the other person using a TDD. During the conversation, only one TDD at a time can transmit tones through the telephone line. Both parties must use TDDs to communicate.

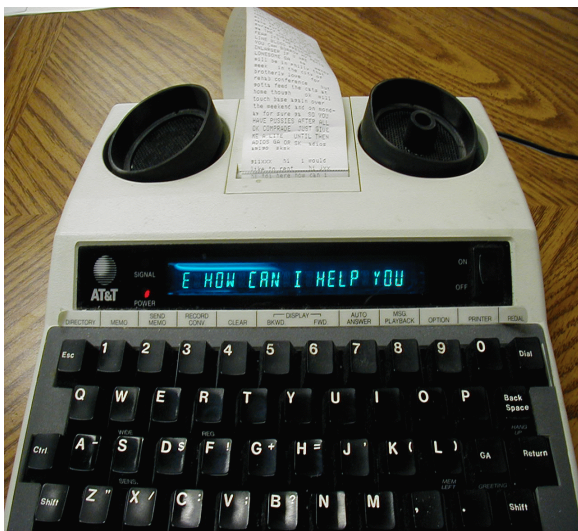


Figure 3 – TTD Photo to accompany Case Study # 6

A person using a TDD does not use the telephone differently than a hearing person, other than adding the use of this device. Just as a hearing person will dial a telephone number and wait to hear a person answer with a greeting before proceeding to speak, a TDD caller will dial a telephone number and wait to read a person's typed greeting and the "GA" (go ahead) protocol before beginning to converse in text. A TDD user does not typically press keys while awaiting a response to his or her call.

The Phoenix 9-1-1 system required the TDD caller to initiate an audible tone, such as hitting the space bar on the TDD, and the operator to recognize the tone to take the call. If the operator

did not receive an audible tone, he or she would treat the silent call as a "9-1-1 hang up." In each case, the operator disconnected the 9-1-1 calls made by the plaintiffs because they failed to emit an audible tone. The system also had only one call-taking station with the capacity to directly respond to a TDD caller, requiring call-takers at every other station to transfer TDD calls to that equipped station.

The three plaintiffs filed suit claiming that the 9-1-1 system discriminated against them in violation of Title II of the ADA. The city responded to plaintiffs' complaint with a motion for summary judgment because it believed that its system, even with the requirement for audible tone transmission and transfer of calls, did not violate Title II's requirements. The plaintiffs then contacted the U.S. Attorney's Office in Phoenix for assistance.

This suit was one of the first cases filed under Title II regarding access to public entities' 9-1-1 systems. Many issues of first impression would arise throughout the litigation. Because of the Department's unique role in formulating the Title II regulation and acting as the primary, though not exclusive, enforcer of the ADA, the Department had developed an expertise that we believed would provide a perspective useful to the court in helping to resolve these issues. The court granted the Department leave to participate in the case as *amicus curiae* to address the issues raised in the city's motion for summary judgment. The briefing was handled jointly by the U.S. Attorney's Office and the Disability Rights Section of the Civil Rights Division.

We asserted in our brief that the ADA recognizes the life-or-death importance of access to 9-1-1 services, and thus sets a high standard for accessibility to those services for persons with disabilities. We relied on the Department's Title II regulation, arguing it was entitled to deference. That regulation requires that individuals who use TDDs be afforded "direct access" to telephone emergency services, including 9-1-1 services, and also requires that 9-1-1 services be as effective for persons who use TDDs as they are for persons without disabilities. We asserted that policies that require users to emit an audible tone in order to receive a response do not satisfy these

requirements because they place an additional burden on TDD users that is not placed on the general public, a burden that, often in emergency situations, is difficult to remember or carry out. In addition, because some TDDs do not emit audible tones, we showed that users of those TDDs would be entirely denied direct, equal access to 9-1-1 services. Further, we argued that utilizing a system in which TDD calls must be transferred to a different call-taking station lacks the "direct access" for TDD callers required by the regulation, steals precious response time, and heightens the risk of calls being dropped or lost. We also cited to the Department's ADA Title II Technical Assistance Manual, which states:

Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

Title II Technical Assistance Manual (II-7.3100).

The court denied the city's motion for summary judgment on the issue of liability. The court found the Department's "no space bar" interpretation reasonable in light of the language, legislative history, and policies of the ADA. *Ferguson v. City of Phoenix*, 931 F. Supp. 688 (D. Az. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998). The court also refused to issue summary judgment in favor of the city's argument that eliminating the space bar requirement would place an undue financial and administrative burden on the city. The city contended that a "no space bar" policy would mean that the city would have to provide additional equipment, redesign workstations, increase the number of operators, and budget for new training. The court found that the city's argument raised genuine issues of material fact that could not be decided on a motion for summary judgment. *Id.*

Following the decision, we hired an expert to evaluate the city's 9-1-1 system. After we explained to the city officials how to ensure an effective system, the city decided to accept our offer for a consent decree. This required the city

to equip its 9-1-1 system with appropriate TDD-compatible technology at every call-taking station, not only for promptly receiving and responding to TDD calls but also for treating silent calls as possible TDD calls and making call backs in cases of disconnected TDD calls. The decree also required appropriate training in handling TDD 9-1-1 calls, and changes in the city's standard operating procedures.

Experience has shown that contrary to the city's claim of undue burden, it is reasonable and necessary to equip each answering position with a TDD so that each operator can handle TDD calls as effectively as non-TDD calls, and so that TDD calls need not be transferred to other lines. Experience has also shown that eliminating audible tone requirements and training operators to recognize incoming TDD calls is crucial to proper and timely emergency responses. Based on the *Ferguson* case, in 1997 and 1998, U.S. Attorneys' offices across the country reviewed the ADA compliance of over 500 9-1-1 providers, negotiating agreements with any that were not providing direct, equal access. *Ferguson* and the ensuing nationwide compliance project have made a tremendous difference in the lives of persons with disabilities by providing direct, equal access to this life-or-death service. ❖

ABOUT THE AUTHORS

❑ **Robert Mather** is a senior trial attorney in the Disability Rights Section. ❖

❑ **Ronald Gallegos** is Deputy Chief of the Civil Division in the U.S. Attorney's Office for the District of Arizona. Mr. Gallegos received a Special Achievement Award from the Civil Rights Division in 2001 for his ADA enforcement work. ❖

Mississippi Arts Pavilion Exhibits: Community Outreach Spurs Local ADA Enforcement

Pshon Barrett

*Assistant United States Attorney
Southern District of Mississippi*

One of the most important components of ADA enforcement at the local level is networking with disability and disability rights organizations. These organizations vary widely in size, level of activity, and level of focus on disability rights. Every state has a network of independent living centers that are federally funded, grant organizations mandated to provide training in individual and systems advocacy. Every state also has a Protection and Advocacy Agency which is federally funded to advocate for children and adults with developmental disabilities and to represent individuals with disabilities in matters involving disability laws including the ADA. The Disability Rights Section maintains a current list of disability organizations in various local areas along with a sample letter informing them that the local U. S. Attorney's office is available to take complaints and provide limited technical assistance under the ADA.

Some of the ways of reaching out to the disability community are to become a speaker at a workshop or seminar on the ADA, send local disability groups copies of all press releases, settlement agreements, consent decrees, and other public documents, and make opportunities to inform them that the U. S. Attorney's office is investigating and processing ADA complaints. Also, it is important to network with the business community by being available to speak at civic organizations such as service clubs, chambers of commerce, and industry groups relating to construction and building. Other models in a U. S. Attorney's office for this kind of community outreach are networking with local victims rights and fair housing groups, Law Enforcement Coordinating Committee outreach activities, and health care fraud task force activities.

As the result of outreach efforts, the U. S. Attorney's Office for the Southern District of Mississippi received a complaint from a local disability rights organization alleging various ADA violations at the Splendors of Versailles Exhibit, a temporary exhibition held at the Mississippi Arts Pavilion. Because the "Splendors of Versailles" Exhibit closed before the complaint

could be fully investigated and resolved, the office continued its investigation of the subsequent exhibit, "The Majesty of Spain," which was also held at the Mississippi Arts Pavilion during the period of March 1 through September 3, 2001. (The Commission estimates that the exhibit was attended by approximately 320,000 people, representing every state and approximately 80 foreign countries.) The exhibit was sponsored by the Mississippi Commission for International Cultural Exchange (Commission), a nonprofit corporation that leased the Arts Pavilion from the City of Jackson, Mississippi.

The investigation consisted of interviews with the complainants regarding alleged violations, as well as a comprehensive architectural survey, by an architect hired under contract, of the interior and exterior of the Arts Pavilion, including all parking areas serving the facility and all pedestrian approaches. All proposed plans to modify various parking lots, ramps, and interior spaces, including restrooms, were approved by the architect before the modifications were made. The Commission was cooperative throughout the investigation, therefore avoiding the need for litigation. Our office reached a formal settlement agreement that resulted in the following architectural and policy modifications at the exhibit. The Commission:

- lowered portions of all service counters to a wheelchair accessible height;
- placed room identification signs with Braille and raised lettering adjacent to room entrance doors within the Pavilion and placed accessible directional signage where needed;
- placed four fully integrated wheelchair seating spaces in the Pavilion theater;
- modified floor level changes within the Pavilion to have an accessible slope;
- installed visual alarm strobes in every room to alert people with hearing impairments of an emergency situation;
- installed a text telephone in the bank of public telephones located in the lobby;

-
- modified the restrooms to provide accessibility features for people who use wheelchairs;
 - constructed an accessible ramp from the main access walk to the front entrance of the Arts Pavilion;
 - included accessibility information in all advertisements, including targeted advertising to people with disabilities;
 - agreed to provide qualified sign language interpreters upon request;
 - agreed to provide alternative formats, such as closed-captioning of the exhibit video, printed transcripts of the audio tour, materials in Braille and large print and audio cassette, and a touch exhibit that contained replicas of a number of the items on display; and
 - modified its policies to ensure that individuals with disabilities accompanied by service animals were allowed in all parts of the exhibit.

After the agreement was executed by all parties, a press release was issued by the U. S. Attorney's Office outlining the terms of the agreement. This press release generated coverage by the print and electronic media and was instrumental in raising awareness of the requirements of the ADA and increasing publicity for the enforcement efforts of the U. S. Attorney's Office. Hopefully, the comprehensive nature of the agreement will serve as a model for other covered entities under the ADA that are looking for guidance in how to make the arts more accessible to, and usable by, people with disabilities.❖

ABOUT THE AUTHOR

❑ **Pshon Barrett** has been an Assistant United States Attorney in the Southern District of Mississippi since 1980. In this position she handles all of the district's enforcement of the Americans with Disabilities Act, supervises the Financial Litigation Unit, and handles a general civil caseload.❖

Defining "Disability" Under the ADA

John L. Wodatch
Chief, Disability Rights Section
Civil Rights Division

Over the last four years, the U.S. Supreme Court has issued a series of rulings interpreting the meaning of the term "disability" in the Americans with Disabilities Act of 1990 (ADA), the federal civil rights statute prohibiting discrimination on the basis of disability. 42 U.S.C. § 12101 - 12213. The definition of disability is an important question because establishing that an individual has a disability is a necessary prerequisite to bringing a claim under the ADA. Because the existence of a disability is critical to the merit of any claim brought under the ADA, courts have required plaintiffs to establish that they have a disability as part of their prima facie case. Moreover, by treating this determination as an initial inquiry before there is a determination of whether unlawful discrimination has occurred, court interpretations of the term disability have specified how to determine the class of persons protected by the ADA, with the result that a significant percentage of ADA claims are dismissed on summary judgment. *See, e.g., Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (asserting that it would "debase th[e] high purpose [of the law] if the statutory protections available to those truly handicapped could be claimed by anyone"); and *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1460 (7th Cir. 1995) (drawing "a clear bright line," between extending the Act's protection to the "truly disabled individual, so that he or she can lead a normal life" and protecting others). The Supreme Court recently echoed this reasoning in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S.Ct. 681 (2002), declaring that the term disability "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled." *Id.* at 691.

Three years ago, the Court issued a trilogy of rulings interpreting the term disability under the ADA: *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); and *Albertson's, Inc. v.*

Kirkingburg, 527 U.S. 555 (1999). In each of those cases, the Court dismissed the employment discrimination claims of workers on the basis that their impairments did not come within the ADA's definition of disability. Because the plaintiffs employed "mitigating measures," such as corrective lenses and medication to lessen the otherwise substantially limiting effect of their impairments, the Court concluded that they were not disabled for purposes of the ADA, and not entitled to be protected from discrimination on the basis of those impairments. This article explains the reasoning of this group of decisions and examines their impact on establishing disability in ADA cases.

I. The definition of disability in the ADA

A. The statutory definition

Like the earlier federal civil rights statutes it was modeled upon, the ADA prohibits discrimination on the basis of disability in nearly every realm of public life. Although its prohibition of employment discrimination (Title I) has given rise to the vast majority of litigation under the statute, of equal significance is its prohibition of discrimination by state and local government entities (Title II) and in places of public accommodation (Title III). Unlike classic forms of discrimination on the basis of race, sex, or age, however, it was necessary to define exactly what would constitute discrimination on the basis of disability. Thus, the ADA provides extensive detailed provisions defining the specific actions that constitute unlawful discrimination under the Act. *See* 42 U.S.C. § 12112 (unlawful discrimination in employment), § 12132 (public services) and § 12182 (public accommodations). The ADA's nondiscrimination provisions encompass two basic kinds of discriminatory actions – differential treatment on the basis of a physical or mental impairment that is, if not driven by animus, at least irrational or unnecessary, thereby reflecting underlying misconceptions and prejudices about ability and the failure to make reasonable accommodations for people with disabilities.

The ADA provides a unique statutory definition of "disability," defining it very broadly, in three alternative and overlapping ways with respect to a given individual: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). When read in conjunction with one another, the three prongs of the definition make clear that for purposes of the ADA, disability can be based on an impairment that currently exists, has existed in the past, or merely exists in the eye of the beholder, and perhaps all three at the same time.

B. The regulatory definition

Although the statute does not define the three essential terms that constitute its comprehensive definition of "disability" – "impairment," "substantially limits" and "major life activities," Equal Employment Opportunity Commission (EEOC) regulations implementing Title I of the ADA provide some guidance. Those regulations make clear that the determination whether a person has a disability for purposes of the ADA must be made on a case-by-case basis, considering the person's particular impairment (past, present or perceived) and its unique impact (or perceived impact) on his or her major life activities. A "physical or mental impairment" is defined very broadly to include "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more...body systems," or "[a]ny mental or psychological disorder..." including "learning disabilities." 29 C.F.R. 1630.2(h). Establishing that one has (or had, or is perceived to have) an impairment is fairly straightforward. It is proving that the impairment substantially limits (or limited, or is perceived to limit) a major life activity that has proven difficult for many ADA plaintiffs. The regulations provide that "substantially limits" means "[u]nable to perform a major life activity that the average person in the general population can perform," or "[s]ignificantly restricted as to the condition, manner or duration under which" one can perform that activity as compared to the "average person in the general population." 29 C.F.R. 1630.2(j)(1). The regulations further

provide that "[t]he following factors should be considered" in that determination: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; [and] (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. 1630.2(j)(2). "Major life activities" are defined functionally – the illustrative examples given by the EEOC are "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working," 29 C.F.R. 1630.2(i), and courts have recognized similar "functional" activities such as reproduction, sleeping, interacting with others, eating, sitting, standing, reaching and concentrating.

As the EEOC regulations make clear, by including the "record of" and "regarded as" prongs in its statutory definition, the ADA recognizes that a "disability" need not impose any actual, current substantial limitation on a person's major life activities to constitute an unlawful basis for discrimination. The "record of" prong protects individuals who have a history of, or who have been misclassified as having had, an impairment that substantially limited a major life activity. 29 C.F.R. 1630.2(k). Similarly, the "regarded as" prong prohibits discrimination against individuals who are treated as if they have a substantially limiting impairment, but who either have no impairment at all or have an impairment that is not substantially limiting. The Supreme Court has recognized that by including this prong in the ADA's broad definition, Congress acknowledged that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Sutton*, 527 U.S. at 489 (quoting *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)).

II. The *Sutton* trilogy

A year before its rulings in the *Sutton* trilogy, the Court ruled that a woman with asymptomatic HIV whose dentist had refused to treat her in his office had a "disability" because she was substantially limited in the major life activity of reproduction. *Bragdon v. Abbott* 524 U.S. 624, at 647 (1998). In doing so, the Court adopted an expansive view of all three constitutive elements

of the ADA's definition of "disability". It ruled that HIV was an "impairment" from the moment of infection, *id.* at 637; that the "breadth" of the term "major," which the Court interpreted to mean "comparative importance" rather than frequency, meant that major life activities were not limited to "those aspects of a person's life which have a public, economic, or daily character," and thus included reproduction, since it is "central to the life process itself," *id.* at 639; and that since "[t]he Act addresses substantial limitations...not utter inabilities," the plaintiff's HIV "substantially limited" her ability to reproduce due to the inherent risk that she would pass HIV on to her partner or her child, *id.* at 641.

In response to the defendant's argument that the plaintiff could lower the risk of parent-to-child transmission from 25 percent to 8 percent if she took antiretroviral drugs, the Court noted that both the EEOC and DOJ had issued interpretive guidance specifically stating that "[t]he determination of whether an individual is substantially limited in a major life activity must be made...without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id.* at 641; 29 C.F.R. pt. 1630, App. s 1630.2(j) (1998); *see also* 28 C.F.R. pt. 35, App. A, s 35.104; 28 C.F.R. pt. 36, App. B s 36.104 (stating the same with respect to "reasonable modification or auxiliary aids and services.") But the Court chose not to resolve the question, concluding that even an 8 percent risk was enough to be substantially limiting. The Court added that "[i]n the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Bragdon, id.* at 641.

One year later, in the *Sutton* trilogy, the Court addressed the question it left open in *Bragdon*. This time, it parsed the three prongs of the definition of disability, and ruled that under the first prong of the definition, "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Sutton* at 482.

In *Sutton*, two severely nearsighted commercial pilots (who also happened to be twin sisters) were denied employment, even though with glasses they each had 20/20 vision, because without correction, they could not see well enough to fly a plane. (They could also not see well enough to drive a car, watch TV, view a computer monitor, or go shopping.) In *Murphy* and *Albertson's*, respectively, a mechanic with high blood pressure and a truck driver who was legally blind in one eye were each fired from their jobs because they could not meet the DOT certification standards for commercial driver licenses, even allowing for corrective measures. Without medication, the mechanic would have had to be hospitalized for his high blood pressure. Conversely, the truck driver's vision could not be corrected, but his own brain had subconsciously compensated for the impairment. Because, with correction, the plaintiffs in *Sutton* and *Murphy* were not substantially limited in any major life activity, the Court ruled that they were not disabled and were not entitled to the protection of the Act. Although *Albertson's* was decided on different grounds, the Court saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems," and concluded that the determination of disability must "take account of the individual's ability to compensate for the impairment." *Albertson's* at 564-65, 567.

The opinion in *Sutton* provided the Court's reasoning for all three cases. First, the Court concluded that because the first prong of the definition is phrased in the present indicative tense, what Congress must have meant by the phrase "substantially limits" is presently, actually limits – not potentially or hypothetically limits. The Court concluded that "[a] 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." *Id.* at 482. Secondly, it concluded that the consideration of impairments in their hypothetical, uncorrected state would require speculation and generalization, which would conflict with the requirement that one make an individualized inquiry when determining

whether a person has a disability. Finally, and perhaps most importantly for the Court, because the findings section of the ADA cites the figure "43 million" as the estimated number of "Americans with one or more physical or mental disabilities," 42 U.S.C. 12101(a)(1), the Court concluded that Congress could not have intended the ADA's non-discrimination mandate to protect "all those whose uncorrected conditions amount to disabilities." *Sutton* at 484.

III. The impact of the *Sutton* trilogy on the ADA

A. Impairments that may no longer be covered

The ADA's definition of "disability" – as interpreted by the Court in the *Sutton* trilogy – applies not just to employment discrimination cases, but also to cases brought under every title of the Act, including the titles prohibiting discrimination on the basis of disability by state and local governmental entities and by places of public accommodation. As a result, lower courts may interpret the ADA to not cover individuals with "correctable" physical and mental impairments. Beyond treatable high blood pressure, correctable vision impairments, self-accommodated monocular vision, and insulin-dependent diabetes (coverage for which was also placed in doubt by the Court in *Sutton*, *id.* at 483), examples of impairments that may not be covered if mitigating measures are taken into account include: hearing impairments that can be corrected with hearing aids, anatomical losses requiring the use of prosthetic limbs, cancer, epilepsy and other seizure disorders, asthma, multiple sclerosis, heart disease, bi-polar disorder, depression, learning disabilities, dyslexia, and attention deficit disorder.

In *Sutton*, the Court responded to the dissent's argument that "viewing individuals in their corrected state will exclude from the definition of 'disab[led]' those who use prosthetic limbs, or take medicine for epilepsy or high blood pressure." *Id.* at 487-88 (citations omitted). The Court wrote:

The use of a corrective device does not, by itself, relieve one's disability...For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of

functioning in society but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited.

Id. at 488. Similarly, in *Albertson's*, the Court stated that "people with monocular vision 'ordinarily' will meet the ADA's definition of disability." In contrast to pre-*Sutton* cases that often found similar impairments to be disabilities for purposes of the ADA's prohibition against discrimination, since *Sutton*, courts have permitted different treatment on the basis of:

- attention deficit disorder (ADD) controlled with medication (*Blackston v. Warner-Lambert Co.*, 2000 WL 122109 (N.D. Ala. 2000); *Barber v. Hood River County*, 2000 WL 1132115 (D.Or. 2000));
- bi-polar disorder treated with Lithium and Ativan (*Kramer v. Hickey-Freeman, Inc.*, 142 F.Supp.2d 555 (S.D.N.Y. 2001)); *but see Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3rd Cir. 1999) (side effects of lithium were substantially limiting) and *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (reversing grant of summary judgment where anxiety and panic disorder persisted despite medications);
- diabetes controlled with medication and a fixed meal schedule (*Sepulveda v. Glickman*, 167 F.Supp.2d 186 (D. P.R. 2001); *Fraser v. U.S. Bancorp*, 168 F.Supp.2d 1188 (D. Or. 2001); *Shields v. Robinson-Van Vuren Assoc., Inc.*, 2000 WL 565191 (S.D.N.Y. 2000); *Gray v. Sears, Roebuck & Co.*, 131 F.Supp.2d 895 (S.D.Tex.2001); *Williamson v. International Paper Company*, 85 F.Supp.2d 1184 (S.D.Ala. 2000)); *but see Lawson v. CSX Transportation Inc.*, 245 F.3d 916 (7th Cir. 2001) (finding that plaintiff's diabetes substantially limited him in the major life activity of eating when it imposed severe restrictions on his ability to eat);
- epilepsy controlled by therapeutic sleep regimen (*Popko v. Penn. State Univ.*, 84 F. Supp. 2d 589 (M.D. Pa. 2000); and

medication (*Arnold v. City of Appleton*, 97 F. Supp. 2d 937 (E.D. Wis. 2000)); *Todd v. Acad. Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999)); *but see Rowles v. Automated Production Sys.*, 92 F.Supp.2d 424 (M.D. Pa. 2000) (denying summary judgment where medication did not eliminate all seizures) and *Otting v. J.C. Penney*, 223 F.3d 704 (8th Cir. 2000) (affirming jury verdict and finding that medication and surgery did not control seizures);

- hearing impairments mitigated with a hearing aid (*Ivy v. Jones*, 192 F.3d 514 (5th Cir. 1999));
- heart conditions controlled by cardiac medication (*Haiman v. Village of Fox Lake*, 55 F. Supp. 2d 886 (N.D. Ill. 1999)); *but see Barnett v. Revere Smelting & Refining Corp.*, 67 F.Supp.2d 378 (S.D.N.Y. 1999) (denying summary judgment where chest pain and breathing difficulty were not cured by Procardia); and
- seizure disorder treated with Dilantin (*Spradley v. Custom Campers, Inc.*, 68 F. Supp. 2d 1225 (D. Kan. 1999)).

One issue that may need to be addressed by the lower courts is a "chicken and egg" problem. People who have the kinds of impairments that are now likely to be excluded from coverage may need a reasonable accommodation in order to use the mitigating measures that, by the Court's holding in the *Sutton* trilogy, disentitle them to a reasonable accommodation. For example, a worker who needs to take medication to mitigate the effects of an impairment may require periodic breaks during the day for that purpose, and permission to take those breaks would be a form of reasonable accommodation. However, if the existence of a mitigating measure eliminates coverage under the ADA, will such an individual be entitled to a reasonable accommodation in the first place? The same complication may arise under titles II and III, which require public entities and places of public accommodation – everything from grocery stores to museums, hotels, restaurants, theaters, lecture halls, private schools, day care centers, health clubs, amusement parks, and doctors offices – to "make reasonable

modifications in policies, practices or procedures" and to provide "auxiliary aids and services" necessary to make their goods and services available to people who, on the basis of a "disability," would otherwise be excluded. In every sector of society, if people with corrected disabilities are no longer covered at all by the statute, not only can they be excluded by the refusal to make accommodations and modifications necessary for their participation, just as in employment, they might also simply be excluded outright.

B. Disabling corrections

In *Sutton*, the Court stated that "in determining whether an individual is disabled, courts and employers [should] consider any negative side effects suffered by an individual resulting from the use of mitigating measures." *Id.* at 484. *See also Murphy*, 527 U.S. at 521 ("[W]e have no occasion here to consider whether petitioner is 'disabled' due to limitations that persist despite his medication or the negative side effects of his medication.") Some courts have interpreted these statements to mean that the mitigating measures one uses to "correct" an impairment can be, themselves, independently "disabling." As examples of such "disabling corrections," the Court cited antipsychotic drugs that can cause neuroleptic malignant syndrome and painful seizures, drugs for Parkinson's disease that can cause liver damage, and drugs for epilepsy and other seizure disorders that can have serious negative side effects. *Sutton, id.* Other examples could include medications that cause extreme drowsiness, nausea, or other severe side effects, corrective surgeries that require an individual to use a colostomy bag or that remove function-related organs, or any of the many different kinds of drugs that are known to cause birth defects.

Before *Sutton*, few courts had addressed the issue of whether a corrective measure used to treat an impairment can, itself, be substantially limiting. Those courts that did address the issue were reluctant to answer in the affirmative. For example, two circuit courts held that individuals whose jobs were eliminated or altered while they were undergoing chemotherapy and radiation treatment for cancer were not permitted to

challenge those actions under the ADA, ruling that the side effects of those treatments – including nausea, vomiting, fatigue, weakness, dizziness, numbness, and pain – did not substantially limit their ability to work. *See Ellison v. Software Spectrum*, 85 F.3d 187 (5th Cir. 1996); *Gordon v. E.L. Hamm & Associates*, 100 F.3d 907 (11th Cir. 1996). However, post-*Sutton*, courts have used the "disabling corrections" language to find coverage even when the underlying impairment itself would not, under *Sutton*, have amounted to a "disability." In *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946 (8th Cir. 1999), the Eighth Circuit found that an electric company worker who had to wear a full-length leg brace at all times to deal with the residual effects of polio was substantially limited in his ability to walk because it limited his range of motion and caused him to limp. *Id.* at 950. The Court concluded that he was covered by the statute because "[u]nlike the petitioners in *Sutton*, [his] brace does not allow him to function the same as someone who never had polio." *Id.* Similarly, in *Marasovich v. Prairie Material Sales*, 1999 WL 1101244 (N.D. Ill.), a district court found a triable issue of fact as to whether a truck driver had a "disability" as a result of back pain that was severe enough to cause him to become dependent upon Valium, concluding that "[o]ne could find that the effects of the Valium...[have] a substantially limiting effect on his ability to work as a truck driver." *Id.* at *6.

The "disabling corrections" theory may introduce uncertainty into the determination whether a person has a "disability" for purposes of the statute. Basing a finding of "disability" solely on the effect of corrective measures means that some individuals who would be covered by the statute one day may not be covered the next. Particularly with respect to medication, the various side effects of corrective measures, as well as the specific measures used, and how consistently they are used, may vary more over time than the basic symptoms of the underlying impairments. For example, side effects of medication typically peak in the beginning, and then plateau as dosages are adjusted and adverse drug interactions are minimized. Given that side effects change over time and are often temporary, courts may be disinclined to find that a person is

thereby substantially limited. *See, e.g., Wheelock v. Philip Morris*, 1997 WL 45292 (E.D. La.) (no coverage for temporary drowsiness caused by drug taken for anger and depression); *Taylor v. Dover Elevator Systems*, 917 F.Supp. 455 (N.D. Miss. 1996) (no coverage for temporary emotional impairments resulting from epilepsy medication). However, because the Court specifically cited the side effects of medication as an example of such "disabling corrections," after *Sutton* courts may take a broader view. *See, e.g., Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3rd Cir. 1999) (finding that the side effects of lithium taken for depression were themselves substantially limiting).

C. Hypothetical "corrections"

In the *Sutton* trilogy, the Court ruled that a person's impairment should be evaluated in light of mitigating measures they are already using. *See Sutton* at 482 ("it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures...must be taken into account..."). Moreover, its rejection of "hypothetical" assessments would presumably cut both ways, and thus prohibit the consideration of hypothetical mitigating measures that an individual has elected *not* to use. In guidance issued following the *Sutton* trilogy, the EEOC has made clear that "speculation regarding whether the person would have been substantially limited if s/he used a mitigating measure is irrelevant." EEOC Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified," at pg. 2. At least two post-*Sutton* courts, however, have found that the failure to employ mitigating measures recommended by one's doctor is sufficient to bar coverage under the Act.

In *Tangires v. Johns Hopkins*, 79 F.Supp.2d 587 (D.Md. 2000), a woman with asthma and a pituitary tumor claimed that she was denied reasonable accommodations and then fired based on her disabilities. The Court found that asthma was readily treatable by broncodilators and corticosteroids, but that because of her tumor, she was reluctant to use the steroids even though her doctor recommended them. Her doctor testified that her asthma was "slow to clear" because of this

refusal and because she "persistently fragmented her medical care by seeking treatment from so many different doctors and in various emergency rooms of different hospitals." *Id.* at 595-96. Finding that "[p]laintiff's persistent refusal to use inhaled steroids to treat her asthma was based on her subjective and unsubstantiated belief that such use would adversely affect her pituitary adenoma," the court ruled that "[s]ince plaintiff's asthma is correctable by medication and since she voluntarily refused the recommended medication, her asthma did not substantially limit her in any major life activity." *Id.* at 596.

Similarly, in *Fraser v. U.S. Bancorp*, 168 F.Supp.2d 1188 (D. Or. 2001), a woman with insulin-dependent diabetes alleged that she was denied permission to eat at her desk in order to prevent her blood sugar from dropping, subjected to harassment and then fired while she was on medical leave having an insulin pump installed. The court noted that she had suffered a diabetic coma in the past, that she was considered a "brittle diabetic" (causing her blood sugar to swing high and low very rapidly), and that "she has had significant difficulty controlling her blood glucose levels, at least in part because at times she failed to follow [her doctor's] advice and drank alcohol, did not exercise, did not monitor her blood glucose as instructed, and did not use insulin as instructed." *Id.* at 1191. Her employer argued that she did not have a "disability," not because her diabetes was fully controlled, but because it *should* have been. It argued that

she failed to take corrective measures that would very easily have controlled her diabetes. Her failure to do so is her responsibility and her fault. Had she taken these simple measures, there is no dispute that she would not have been substantially limited in any major life activity. She cannot bootstrap herself into coverage under the ADA by acting irresponsibly and failing to take the measures that any similarly situated prudent person would.

Id. at 1193. Although the court ultimately found that she had not demonstrated that she was ever actually substantially limited in any major life activity even taking her "poor self-care" into account, *id.*, it did not reject the employer's

argument that her diabetes should be evaluated in its hypothetically controlled state.

At least one court has permitted the determination of "disability" to turn on the plaintiff's unwillingness to use "corrections" preferred by his employer. In *Pangalos v. Prudential Insurance Co.*, 1996 WL 612469 (E.D. Pa.), *aff'd*, 118 F.3d 1577 (3rd Cir. 1997), *cert. denied*, 522 U.S. 1008 (1997), a case decided before *Sutton*, a traveling salesman with ulcerative colitis (causing uncontrollable diarrhea) decided to control his condition with diet and ready access to toilet facilities rather than undergo a surgical colostomy, which would have "cured" the colitis but left him with a colostomy bag for the rest of his life. When he and his employer could not agree on a reasonable accommodation, he was fired. The court questioned why the plaintiff did not just wear a diaper and expressed doubt about the reasonableness of his decision not to have a colostomy, stating that "[i]f plaintiff were to undergo a successful colostomy, he would no longer be disabled." *Id.* at *3. The Court concluded that "[e]ither plaintiff is not disabled, because the disabling condition he alleges could readily be remedied surgically, or plaintiff is not qualified to perform the essential duties of his position with the defendant." *Id.*

Other courts, however, have been less receptive to employers' attempts to dictate the course of their employees' treatment. *See, e.g., Finical v. Collection Unlimited*, 65 F.Supp.2d 1032 (D. Ariz. 1999) (denying summary judgment to an employer who argued that plaintiff, whose hearing impairment caused her to miss 37 percent of normal speech, should not be considered a person with a disability because she should have been using a hearing aid); *Lent v. Goldman Sachs & Co.*, 1998 WL 915906 (S.D.N.Y.) at *9 (denying summary judgment to employer who argued that it justifiably fired employee because he had a "cavalier" attitude and exercised "poor judgment" about taking his epilepsy medication).

The Court's rulings in the *Sutton* trilogy create a narrow interpretation of "disability," consistent with the Court's view that the term "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled." *Toyota* at 691. As a result of the *Sutton* trilogy, the ADA may now be

interpreted to not protect individuals with any physical or mental impairment that is (or, in the view of some courts, could be) "corrected" with mitigating measures, ranging from visual and hearing impairments, cancer, epilepsy, diabetes, asthma, multiple sclerosis, and heart disease to mental illness. As a result, it is important that U.S. Attorneys' Offices that undertake affirmative ADA enforcement efforts carefully develop a record regarding an individual's limitations on the basis of disability. If mitigating measures are taken, make sure to consider side effects of those measures, *e.g.*, adverse effects of medications, and

whether there are still significant limitations, despite the mitigating measures, for individuals as compared with the general population. Though the *Sutton* trilogy may have narrowed the potential universe of covered individuals with disabilities, coverage can still be established and discrimination on the basis of disability can be remedied.❖

ABOUT THE AUTHOR

❑ **John L. Wodatch** is the Section Chief of the Disability Rights Section of the Civil Rights Division of the Department of Justice.✉

Project Civic Access: A Nationwide Initiative to Ensure Participation in All Aspects of Civic Life

Susan Buckingham Reilly
Deputy Chief
Disability Rights Section

In 2002 the Civil Rights Division's Disability Rights Section (DRS) celebrated the 12th anniversary of the enactment of the Americans with Disabilities Act of 1990 (ADA), by showcasing one of its most successful initiatives, "Project Civic Access" (PCA). Photographs of officials and people with disabilities from PCA communities have been displayed on the Section's ADA Home Page, <http://ada.gov>, along with their comments on what the Section's efforts have meant for local communities.

Project Civic Access was launched in October 1999 after the Section's settlement with the city of Toledo, Ohio. The city agreed to remove barriers and relocate activities throughout its city government in order to provide people with



Figure 1 – Wheelchair access to town hall in rural community

disabilities access to its programs, services, and activities, as required by title II of the ADA. The agreement was so successful that it became the cornerstone of one of the Section's largest projects – to ensure that people with disabilities have an equal opportunity to participate in civic life, a fundamental right in American society.

President Bush has embraced the Project as supportive of his New Freedom Initiative, dedicated to tearing down barriers to equality that face many of the fifty-four million Americans with disabilities. As Assistant Attorney General Ralph F. Boyd, Jr., said on January 30, 2002, when announcing twenty-one new PCA settlement agreements:

Now more than ever we Americans treasure our freedoms, whether to participate in a town council meeting, bring a claim to court, attend a graduation at the municipal auditorium, or enjoy our city parks, museums, or libraries. This Administration is committed to helping state agencies, counties, cities, towns, and villages comply with the ADA by eliminating the physical and communication barriers that prevent people with disabilities from participating fully in their communities.

The Project includes fifty-five sites. These were chosen using several criteria, including the Section's desire to include a site from every state, the population of the site, the existence of a complaint from a person with a disability, and the site's proximity to a university or tourist attraction. The majority of compliance reviews occurred in small cities and towns because they represent the most common form of local government. Among those selected, eighteen localities and two states had administrative complaints lodged against them with DRS by individuals with disabilities. The remaining thirty-five sites included a community in each remaining state, two communities in Puerto Rico, and two Departments of the District of Columbia. DRS undertook the compliance reviews on its own initiative under the authority of title II and, in many cases, section 504 of the Rehabilitation Act, which prohibits discrimination in federally assisted programs. The Section has 504 authority to investigate governments that receive financial assistance from the Department of Justice.

To date, investigations of fifty-one governments have resulted in voluntary compliance through administrative settlement agreements. All of the settlements are posted on the ADA Home Page as a blueprint for other communities to come into compliance with the law. Two technical assistance booklets developed as part of PCA – “Americans with Disabilities Act: ADA Guide for Small Towns” and “The ADA and City Governments: Common Problems” – also appear there. Both review the ADA's requirements and provide practical examples of ways they can be met.

During the investigations, DRS reviewed compliance with most title II requirements. Section staff found that most state and local officials knew about the ADA, had made some efforts to comply, and were willing to work through remaining issues amicably. Indeed, what began as a federal enforcement effort soon became an unprecedented exercise in federal-state/local cooperation in an effort to ensure that all citizens, with and without disabilities, can participate fully in their communities.

The resulting settlement agreements require physical modifications to improve accessibility to such facilities as city and town halls; fire, police, and sheriff departments; courthouses; centers for health care delivery, childcare, teen and senior activities, conventions, and recreation; animal shelters; libraries; baseball stadiums; and parks (including ice skating rinks, public pools, playgrounds, ball fields and bleachers, band shells, and even a gazebo). Modifications typically include accessible parking; accessible routes into and through facilities; accessible restrooms, drinking fountains, and telephones; accessible service counters and concession stands, or the provision of services at alternate, accessible locations; and accessible showers, locker rooms, and restrooms at recreation centers and public pools.



Figure 2 – Curb ramps ensure access for people with mobility impairments

The agreements also provide for physical modifications to polling places and/or provisions of curbside or absentee balloting; establishment of delivery systems and time frames for providing auxiliary aids and services for individuals who have hearing, vision, or sight impairments (qualified interpreters and alternate formats (Braille, large print, cassette tapes, etc.)); installation of assistive listening systems in courtrooms, municipal auditoriums, and conference rooms for people who are hard of hearing; better telephone communication between the government and citizens with hearing or speech impairments through the acquisition of additional telecommunication devices for the deaf (TDDs) and/or the utilization of the state relay service; adoption of procedures for relocating inaccessible activities to accessible locations upon request; and compliance with the ADA's administrative requirements (notice to members of the public of their ADA rights, appointment of an ADA Coordinator, and establishment of an ADA grievance process at the local or state level).



Figure 3 – Qualified interpreters may need to be provided for town meetings

DRS staff are revisiting many of the PCA sites to assess compliance with the terms of the settlement agreements. Although the first phase of PCA is nearing completion, making everyday civic life accessible for this nation's people with disabilities remains a top priority. The Section is therefore gearing up PCA II, which will involve reviews of a locality in each state, the District of Columbia, and Puerto Rico over a three year period. Through our efforts, and those undertaken by conscientious state and local governments on their own initiative, we hope to see the day when ADA's promise of accessible state and local government programs and services is fully achieved.

U.S. Attorneys' Offices interested in conducting a title II review of a neighboring village, town, city, county, or group of state facilities may contact the Disability Rights Section. The Section has model letters, checklists, and settlement provisions that can assist other offices in those efforts.❖

ABOUT THE AUTHOR

❑ **Susan Buckingham Reilly** is Deputy Chief of the Investigations Unit of the Disability Rights Section. Prior to joining DRS, she worked at EEOC for seventeen years, most recently as its Washington Field Office Director, and then spent

two years as a manager in USDA's Office of Civil Rights.✘

Reasonable Accommodations Under the Fair Housing Act

Myron S. Lehtman
Senior Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division

Scott Moore
Senior Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division

I. Introduction

The Federal Fair Housing Act, 42 U.S.C. §§ 3601 - 19 (the Act), prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability. One type of disability discrimination prohibited by the Act is the refusal to make "reasonable accommodations" in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B). Since the enactment in 1988 of the prohibitions against discriminating on the basis of disability, the Department of Justice (DOJ), both through the work of attorneys in the Housing and Civil Enforcement Section of the Civil Rights Division (HCE) and in offices of United States Attorneys throughout the country, has frequently filed complaints alleging that housing providers have violated the Act by refusing to grant reasonable accommodations to persons with disabilities. Examples of complaints filed by the United States in this area may be found at the website maintained by HCE at:

<http://www.usdoj.gov/crt/housing/caselist.htm#disabil> .

The Act provides two statutory bases for filing complaints by the United States. First, the United States is required to bring an action in federal court on behalf of an aggrieved person where the Department of Housing and Urban Development (HUD), following investigation of a discrimination complaint filed by the person, determines that there is reasonable cause to believe that discrimination has occurred and either the complainant or respondent elects to have the matter heard in federal court. 42 U.S.C. § 3612(o). Second, the Attorney General is empowered to initiate lawsuits in federal court when he has reason to believe that a person or entity is involved in a "pattern or practice" of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. 42 U.S.C. § 3614(a). Aside from bringing such litigation, the United States also participates as *amicus curiae* in federal court cases that raise important legal questions involving the application or interpretation of the Act, and as an intervener in cases to defend the constitutionality of the Act.

II. Who's covered?

The Act prohibits housing providers from discriminating against applicants or residents because of their disability, or the disability of anyone associated with them, and from treating persons with disabilities less favorably than others because of their disability. 42 U.S.C. § 3604(f)(1). The Act defines a person with a disability to include: (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3)

individuals with a record of such an impairment. To qualify as a person with a disability covered by the Act, an individual must have, be regarded as having, or have a record of: (1) a physical or mental impairment and (2) at least one major life activity that is substantially limited by that impairment.

The term "major life activity" includes those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks that are central to daily life, caring for one's self, learning, speaking, and working. *See* 24 C.F.R. § 100.201 (HUD regulations defining "major life activities"). This list of major life activities is not exhaustive. For example, the Supreme Court ruled in *Bragdon v. Abbott*, 524 U.S. 624 (1998), that a person who is HIV positive has a disability because she is substantially limited in the major life activity of reproduction (*i.e.*, child bearing).

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current illegal use of a controlled substance) and alcoholism. *See* 24 C.F.R. § 100.201 (HUD regulations defining "physical or mental impairment"). The term "substantially limits" suggests that the limitation is "considerable" or "to a large degree."

Juvenile offenders and sex offenders, by virtue of their status, are *not* persons with disabilities protected by the Act. Similarly, while the Act does protect persons who are recovering from substance abuse, *see e.g.*, *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995), it does *not* protect persons who are currently engaging in the illegal use of controlled substances for discrimination based on that use. 42 U.S.C. § 3602(h)(3). Additionally, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals, or result in substantial physical damage to the property of others, unless the threat can be eliminated or significantly

reduced by a reasonable accommodation. 42 U.S.C. § 3604(f)(9). *See e.g.*, *Roe v. Sugar River Mills Associates*, 820 F. Supp. 636, 639 (D. N.H. 1993) (holding that "the Act requires defendants to demonstrate that 'no reasonable accommodation' will eliminate or acceptably minimize the risk [a resident] poses to other residents ... before they can lawfully evict him.>").

III. Reasonable accommodation

A. What is it?

A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. *See* 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.202 (HUD regulations on reasonable accommodations). In litigation brought by the United States under the Act, the neutral rules, policies, or practices challenged have been as diverse as zoning regulations that have operated to preclude small group homes for persons with disabilities in areas zoned for single-family residences or "no pet" rules of apartment complexes that have operated to preclude assistance animals for persons with disabilities.

Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. *See Groome Resources LTD, LLC v. Parish of Jefferson*, 234 F. 3d 192, 201-02 (5th Cir. 2000) ("The 'reasonable accommodations' language, now codified in 42 U.S.C. § 3604(f)(3)(B), specifically targeted the type of zoning regulations [single-family residential] at issue here. Congress found that these seemingly 'neutral rules and regulations', even those involving commercial/ noncommercial zoning distinctions, . . . had a discriminatory effect on the housing choices available for the disabled."). Accordingly, the "reasonable accommodation" provision extends the reach of the Act beyond intentional acts of discrimination and mandates an affirmative duty to equalize housing opportunities for persons with

disabilities. *Smith & Lee Associates v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) (noting that the Act "is concerned with achieving equal results, not just formal equality"); *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1995) (holding that the Act "imposes an affirmative duty to reasonably accommodate" persons with disabilities), *aff'd* 514 U.S. 725, 737 (1995) ("FHA anti-discrimination provisions ... require 'reasonable' accommodations to afford persons with [disabilities] equal opportunity to use and enjoy housing.")

Congress recognized that because discrimination against persons with disabilities is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect," H.R. Rep. No.100-711 at 25 (1988) *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186 (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)), the Act's broader goal of "ending the unnecessary exclusion of the handicapped from the American mainstream," H.R. Rep. 711 at 25, would never be realized if it did not mandate such an affirmative duty. *Id.* (noting that treating persons with disabilities the same as others often does not guarantee equal housing opportunity). The statutory directive means that persons with disabilities are entitled to a degree of special treatment, *i.e.*, a "reasonable accommodation", which requires that a generally applicable rule be changed "so as to make its burden less onerous on them." *Oxford House, Inc. v. Township of Cherry Hill*, 799 F.Supp. 450, 462 n.25 (D. N.J. 1992). *See also Shapiro v. Cadman Towers*, 51 F.3d 328, 334 (2d Cir. 1995) (rejecting argument that concept of reasonable accommodation requires only equal treatment and does not extend to "affirmative action" in holding that a housing cooperative's refusal to modify its "first come/first served" policy to provide a parking space for a person with a mobility impairment would likely violate the Act); *Proviso Ass'n of Retarded Citizens v. Village of Westchester*, 914 F.Supp. 1555, 1563 (N.D. Ill. 1995) ("the very fact that plaintiff residents are developmentally disabled and entitled to reasonable accommodations under the FHA in itself assures certain special, 'unequal treatment'"). *See also U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1521 (2002) (holding

that federal statutes providing for reasonable accommodations recognize "that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal.")

Simply put, the Act makes it unlawful to refuse to make reasonable accommodations to rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling. To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. *See Bronk v. Ineichen*, 54 F. 3d 425, 429 (7th Cir. 1995) (stating that "necessity" requires a showing "that the desired accommodation will affirmatively enhance a disabled person's quality of life by ameliorating the effects of the disability."). The following example provided by a case handled by AUSA Marla Tepper of the U.S. Attorney's Office for the Eastern District of New York illustrates this principle:

Example: Sea Cliff Towers Owners Corporation (Sea Cliff) is a cooperative apartment corporation which owns a residential apartment building in Staten Island, New York consisting of approximately 120 apartments with parking spaces for 61 cars. Sea Cliff assigned parking spaces on a "first come/first served" basis and maintained a waiting list for new assignments. It had never designated any space for use by persons with disabilities.

"Roberto Alberti" (not his real name) resided in Sea Cliff Towers with his wife. He had various heart impairments, diabetes, and cancer of the bladder, which significantly impaired his ability to walk and required him to use a cane. Walking was painful to him and exacerbated his medical problems. Mr. Alberti used his car to get to medical appointments and for his daily needs.

Mr. Alberti notified Sea Cliff of his disabilities when he underwent the interview necessary to purchase his apartment. Following its usual practice, it placed him on the waiting list for a parking spot. Thereafter, Mr. Alberti repeatedly requested a reserved parking space as an accommodation for his disabilities. Sea Cliff

denied his requests. Even after two years of living at Sea Cliff, 25 residents still preceded Mr. Alberti on the waiting list. Without a reserved spot in close proximity to the building, Mr. Alberti had to walk significant distances to his building.

Consequently, Mr. Alberti filed an administrative complaint with HUD. Immediately following the filing, Sea Cliff created a "handicapped drop off" space near the front of the building and claimed it had sufficiently accommodated him. It had not, for Mr. Alberti could use this spot only if accompanied by another driver.

Following an investigation, HUD charged Sea Cliff with discriminating against Mr. Alberti on the basis of disability by refusing to reasonably accommodate him in violation of the Fair Housing Act. See 42 U.S.C. § 3604(f)(3)(B). After Sea Cliff elected, pursuant to 42 U.S.C. § 3612(a), to proceed in federal court, the United States Attorney's Office for the Eastern District of New York – represented by AUSA Tepper – filed suit – *United States v. Sea Cliff Towers Owners Corp.*, CV-98-0095 (E.D. N.Y. 1998) – and successfully negotiated a consent order providing for injunctive relief and \$12,000 in damages to the Albertis.

Among other things, the injunctive relief required Sea Cliff to provide Mr. Alberti with a parking spot near the building entrance. The order barred Sea Cliff from reducing the size of the spot in any way, including through use by neighboring cars, redrawing of lines, or erection of barriers. If Mr. Alberti moves, the spot will remain available for use by a resident with a disability requiring an accommodation. In addition, other individuals for whom a similar accommodation is necessary will be placed on the top of the waiting list and assigned spots as they become available if the designated accessible space is not available. The order also required Sea Cliff to make available to all residents applications for reasonable accommodations and to identify a specific employee as responsible for processing these applications. The application advises residents that Sea Cliff's policy is to make reasonable accommodations when necessary to afford current and future residents with disabilities equal opportunities to use and enjoy their apartments,

and specifies the procedure for requesting an accommodation.

To ensure that Sea Cliff responded appropriately to reasonable accommodation requests in the future, the injunctive relief also required three members of the Sea Cliff's board of directors, and the employee who handled reasonable accommodation requests, to attend training in the nondiscrimination provisions of the Fair Housing Act, including training on the reasonable accommodation requirements of the Act.

Under the Act, a resident or an applicant for housing makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability. 24 C.F.R. 100.204. She should explain what type of accommodation she is requesting and, if the need for the accommodation is not readily apparent or not known to the provider, explain the relationship between the requested accommodation and her disability. While an applicant or resident is not entitled to receive a reasonable accommodation unless she requests one, there is no uniform rule concerning when and how a reasonable accommodation request must be made. A person with a disability does not need to make the request herself; the request can be made by a family member or someone else who is acting on her behalf. An individual making a reasonable accommodation request does not need to mention the Act or use the words "reasonable accommodation."

B. Denials of requested accommodations

A provider has an obligation to provide prompt responses to reasonable accommodation requests. While the statute makes unlawful a "refusal" to make a reasonable accommodation, 42 U.S.C. § 3604(f)(3)(B), extended delays have been held to trigger the protections of the Act. See *Groome Resources*, 234 F.3d at 200-02 (holding that a reasonable accommodation claim was not premature where the defendant failed to act on the request within a reasonable time).

A housing provider can deny a request for a reasonable accommodation if the request was not

made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable, *i.e.*, if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations. *City of Taylor*, 102 F.3d at 795; *Hovson's, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996); *See also* H.R. Rep. 711 at 25 and n.66 (observing that courts interpreting the "reasonable accommodations" provision of the Fair Housing Act should look to the "long history in regulations and case law" under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, interpreting a similar provision in that statute).

The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would adequately meet the requester's disability-related needs. Moreover, the reasonable accommodations inquiry is not concerned with the general reasonableness of the rule or policy at issue. Rather, it is concerned with whether the requested *exception* to that policy is reasonable.

A Fifth Circuit case interpreting the meaning of "reasonable accommodations" under § 504 of the Rehabilitation Act, 29 U.S.C. illustrates the point. In that case, *Majors v. Housing Authority of DeKalb County*, 652 F.2d 454 (5th Cir 1981), a person with a disability sought an exception to a governmental housing authority's no-pet rule. The Court held: "Even if the 'no pet' rule is itself eminently reasonable, nothing in the record rebuts the reasonable inference that the Authority could easily make a limited exception for that narrow group of persons ... whose [disability] requires ... [the disability-related assistance] of a dog."

See also H.R. Rep. 711 at 25 ("A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such

rule or practice has traditionally been constituted").

When a provider refuses a requested accommodation because it is not reasonable, the provider should engage in an interactive dialogue with the requester to determine if there is an alternative accommodation that would effectively address the requester's disability-related needs without a fundamental alteration to the provider's operations and without imposing an undue financial and administrative burden. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it.

Example: As a result of a disability, a resident is physically unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The resident requests that the housing provider send a maintenance staff person to his apartment on a daily basis to collect his trash and take it to the dumpster. Because the housing development is a small operation with limited financial resources, and the maintenance staff are on site only twice per week, it may be an undue financial and administrative burden for the housing provider to grant the requested daily trash pick-up service. Accordingly, the requested accommodation may not be reasonable. If the housing provider denies the requested accommodation as unreasonable, the housing provider should engage in an interactive dialogue with the resident to find out what alternative reasonable accommodations could be provided to meet the resident's disability-related needs, for instance, placing an open trash collection can in a location that is readily accessible to the resident so the resident can dispose of his own trash and the provider's maintenance staff can then transfer the trash to the dumpster when they are on site. Such an accommodation would not involve a fundamental alteration of the provider's operations and would involve little, if any, financial and administrative burden for the provider while accommodating the resident's disability-related needs.

There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally

effective in meeting the individual's disability-related needs. In such a circumstance, the provider may engage in an interactive dialogue with the individual to see if she is willing to accept the alternative accommodation. This process often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider. Nevertheless, persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation.

A "fundamental alteration" is a modification that is so significant that it alters the essential nature of a provider's operations.

Example: A resident has a severe mobility impairment that substantially limits his ability to walk. He asks his housing provider to transport him to the grocery store and assist him with his grocery shopping as a reasonable accommodation to his disability. The provider does not provide any transportation or shopping services for its residents, so granting this request would require a fundamental alteration in the nature of the provider's operations. The request can be denied, but the provider should engage in an interactive dialogue with the requester to see if there is any alternative accommodation that would meet the requester's disability-related needs without fundamentally altering the nature of its operations. One option might be to reduce the resident's need to walk long distances by altering its parking policy to allow a volunteer from a local community service organization to park her car close to the resident's unit so she can transport the resident to the grocery store and assist him with his shopping.

Courts have ruled that the Act may require a housing provider to grant a reasonable accommodation that involves costs, so long as the reasonable accommodation does not pose an undue financial and administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider's operations. *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994) (noting that landlord may be required "to shoulder certain costs . . . so long as

they are not unduly burdensome"); *Remed Recovery Cure Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 684 (E.D. Pa. 1999) (holding that an accommodation may involve some costs). The financial resources of the provider, the cost of the reasonable accommodation, the benefits of the requested accommodation to the requester, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant's or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative burden. The Act, however, does not require housing providers to offer supportive services, such as counseling and medical care, that would not otherwise be provided. *See* 24 C.F.R. ch. 1, subch. A, app. I, 54 Fed. Reg. 3249 (Jan. 23, 1989) (Preamble to HUD regulations).

IV. Recent pattern or practice litigation

In November, 2001, HCE filed suit against a retirement community alleging disability discrimination, including the denial of reasonable accommodations. The suit, being litigated by senior trial attorney Scott Moore, alleges that the community adopted a policy prohibiting motorized wheelchairs or scooters in the common use areas of the development. As a result of this policy, tenants with mobility impairments were unable to access any of the extensive common areas of the development including the dining area where the retirement community serves three meals per day to tenants, the cost of which is included in the rent. The suit alleges that the failure to waive the policy constituted a failure to provide a reasonable accommodation. In addition, the suit alleges that the retirement community violated other provisions of the FHA by (1) imposing several other policies and procedures only on tenants who use motorized scooters or wheelchairs, such as charging them an extra \$1,000 security deposit, making them carry personal liability insurance on the possession or use of motorized wheelchairs, and requiring that they occupy only first floor apartments, and (2) by attempting to exclude and otherwise to discourage persons who use wheelchairs from renting an apartment at the community. Other retirement communities across the country have similar

policies that treat persons with physical disabilities who use motorized wheelchairs and scooters less favorably than other residents.

V. Conclusion

The "reasonable accommodation" provision of the Fair Housing Act is an important addition to the arsenal necessary to combat and remedy discrimination on the basis of disability in cases handled by attorneys representing the United States. ❖

ABOUT THE AUTHORS

□ **Myron S. Lehtman** is a Senior Trial Attorney in the Housing and Civil Enforcement Section of the Civil Rights Division and is nearing his 29th year with the Division. In 2001, he received a Special Commendation Award for his work on a reasonable accommodation case involving a group home for abused and neglected children. ❖

□ **Scott Moore** is a Senior Trial Attorney in the Housing and Civil Enforcement Section of the Civil Rights Division. In 2001, he received a Special Commendation Award for his work on disability discrimination cases under the FHA. ❖

U.S. Attorneys Join Battle to Combat Inaccessible Housing

Joan Laser
Assistant United States Attorney
North District of Illinois

Marla Tepper
Assistant United States Attorney
Eastern District of New York

I. Introduction

Persons with disabilities (and other persons associated with them) first came within the protective ambit of the federal Fair Housing Act, 42 U.S.C. § 3604(f) (the Act), on March 13, 1989, when amendments to the original Fair Housing Act generally became effective. In enacting these amendments, Congress believed that simply affording persons with disabilities traditional fair housing protections was not sufficient to ensure them equal access to housing. Congress recognized that inaccessible housing just as effectively excludes persons with mobility impairments as housing on which a sign is posted stating "No Handicapped People Allowed." H.R. Rep. No. 100-711 at 25 (1988) *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.

Accordingly, the amended Act, in addition to providing rights to persons with disabilities analogous to those accorded other protected classes (*compare e.g.*, 42 U.S.C. §§ 3604(a) and (b) with 42 U.S.C. § 3604(f)(1)(2)), requires that "covered multifamily dwellings" be designed and constructed with specific features of accessibility and adaptability. 42 U.S.C. § 3604(f)(3)(C). Unlike the other protections accorded persons with disabilities under the amended Act, these "design and construction" requirements did not become effective until March 13, 1991. *Id.* Congress delayed the effective date to "allow architects and builders adequate time to finish building projects already under way and make design modifications that will be adequate in the future." 134 Cong. Rec. S10,544-02 (daily ed. Aug. 2, 1988) (statement of Sen. Hatch).

"Covered multifamily dwellings" are multifamily buildings which were first occupied after March 13, 1991, and include all units in such buildings with elevators and ground-floor units in buildings having four or more units and no elevators. 42 U.S.C. § 3604(f)(7).

As amended, the Act makes it unlawful to fail to design and construct "covered multifamily dwellings" so that:

1. Public and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;
2. All doors designed to allow passage into and within all premises within the dwellings are sufficiently wide to allow passage by persons who use wheelchairs;
3. All premises within the dwellings contain the following features of adaptive design:
 - a. An accessible route into and through the dwelling;
 - b. Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
 - c. Reinforcements in bathroom walls to allow later installation of grab bars; and
 - d. Usable kitchens and bathrooms such that an individual who uses a wheelchair can maneuver about the space.

42 U.S.C. § 3604(f)(3)(C).

The United States brought its first "design and construction" case in 1993, *United States v. Architecture One*, C.A. 93-2-2262 (D. Colo.). Other cases soon followed. In 1995-96, the Housing and Civil Enforcement Section of the Civil Rights Division of the Department of Justice (HCE), with the assistance of the John Marshall School of Law and Access Living of Chicago (an independent living center), conducted a series of "tests" of forty-nine complexes, including apartments and condominiums, then under construction in a six-county area of metropolitan Chicago. Of those tested, only one development was found to have complied fully with the "design and construction" requirements of the Act. The remainder had violations which ranged from relatively minor to wholesale in nature. The United States, through litigation brought by attorneys in HCE and the United States Attorney's Office for the Northern District of Illinois, filed suits against twenty-six of those developments evidencing the most egregious violations. Examples of complaints filed by the United States

in this area may be found at the website maintained by HCE at:

<http://www.usdoj.gov/crt/housing/caselist.htm#disabil> .

HCE has also prepared an internal training manual which is available to AUSA's upon request.

As an outgrowth of the Chicago cases, the Civil Rights Division sponsored a number of seminars around the country for AUSA's interested in learning more about governmental enforcement of the "design and construction" provisions of the Act. AUSA Joan Laser of the Northern District of Illinois and AUSA Marla Tepper of the Eastern District of New York are just two of the assistants who have participated in that enforcement effort. The following highlights some of the recent work undertaken by these two AUSA's in their respective districts:

II. Northern District of Illinois

A. Inaccessible housing has real consequences

Prairie Trails Apartments in Woodstock, Illinois is one of the forty-nine sites tested in metropolitan Chicago at which serious violations existed. The complex has 168 rental units located in four, two-story buildings. Because the complex has no elevators, only the eighty-four ground-floor units at Prairie Trails must comply with the Act.

"Ruth Clark" (not her real name) was seventy-nine years old when she rented a one-bedroom apartment at Prairie Trails not long after its construction. Each room in her unit had baseboard heating with controls six inches from the floor which she could not adjust by herself because of a physical infirmity. When she wanted to adjust the temperature, she had to call one of her children, who lived some distance away, to come over and change the setting. She also had to call her children to adjust her air conditioning. Its controls stood more than six feet from the ground.

After living at Prairie Trails for several years, Mrs. Clark fell and broke her lower leg and ankle. Because of the nature of the break, she could not walk while the leg healed and had to use a wheelchair for mobility. Mrs. Clark had a very

difficult time getting through both the bedroom and bathroom doors in her wheelchair and using the very small bathroom once inside. Indeed, on one occasion, she found herself imprisoned within the bathroom for five hours after getting stuck there because of inadequate space for her wheelchair.

That incident confirmed that she could no longer attempt to use the bathroom. She purchased a portable commode, which she stationed in her living room which was the only space where it would fit and be usable. After several months, a public health nurse visited Mrs. Clark and told her that local sanitation laws forbade her from using a portable commode in the living room. Believing she had no other viable options, Mrs. Clark moved to a nursing home.

Had the architects and builders designed and built Prairie Trails in compliance with the Fair Housing Act, Mrs. Clark would have experienced none of the problems she endured at the complex because of the inaccessible design and construction of her apartment. Most important, she would not have had to move to a nursing home, since in a properly designed apartment, she would have been able to use her wheelchair to enter and use the bedroom and bathroom.

B. The investigation

AUSA Joan Laser initiated an investigation of Prairie Trails based upon the evidence first uncovered in the fair housing tests. She augmented those tests by reviewing the development's construction documents with an architect familiar with the accessibility requirements of the Act and personally inspecting the complex. Her investigation confirmed that Mrs. Clark's experience could have been readily predicted. It revealed that *all* the bedroom and bathroom doors in all units covered by the Act were too narrow to allow passage by a person with a disability who uses a wheelchair. 42 U.S.C. § 3604(f)(3)(C)(ii). In addition, most bathrooms lacked sufficient room for a wheelchair user to enter and close the door behind them and, once in, to even use the facilities. Kitchens, too, lacked sufficient clear floor space for wheelchair maneuverability, failing to meet the statutory mandate of usability. *See* 42 U.S.C. § 3604(f)(3)(C)(iii)(IV) (requiring "usable

kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space"). The investigation further confirmed that the heaters were too low and the air-conditioning controls too high for a wheelchair user to reach in the units covered by the Act. These features, too, violated the Act. *See* 42 U.S.C. § 3604(f)(3)(C)(iii)(II) (requiring "thermostats, and other environmental controls [to be] in accessible locations").

C. The remedy

As with many "design and construction" cases brought by the United States, the Prairie Trails litigation quickly settled after the United States filed suit. In negotiating the settlement, one of the challenges faced by AUSA Laser was that the development is a "low-end" property and the design "footprint" or layout of the units was very small, making full after-the-fact retrofitting difficult to achieve. In this case, insistence on the retrofitting of all units to bring them into full compliance with the Act would have resulted in a bizarre redesign of the units, likely making them neither marketable nor desirable to persons with or without disabilities. Nevertheless, the Consent Decree requires the owners to offer a full or partial retrofit to all current and future tenants who want them. The Decree also provides for a \$100,000.00 damages fund for anyone who had lived there or tried to live there and had been injured by the lack of accessibility. Through notices placed in local newspapers after the case settled, AUSA Laser located Mrs. Clark, who received \$25,000 from the fund to compensate her for the discriminatory treatment she had endured.

III. Eastern District of New York

A. Background

AUSA Marla Tepper recently represented the United States in a precedent setting case challenging the design and construction of "Meadows at Mitchel Field" (Meadows), a housing complex for senior citizens in Nassau County, New York. What made this litigation unique is that the Meadows consists of prefabricated, modular housing. The violations of the Fair Housing Act, however, were not uncommon. The complaint filed by the United States alleged that the ground floor units of the 438-unit Meadows complex are not accessible

to people in wheelchairs because three steps lead to the entrance of each ground floor apartment; doorways in the apartments are too narrow for wheelchairs; and light switches, electrical outlets, and thermostats are in locations inaccessible to individuals in wheelchairs. In April 2002, the defendants, three Nassau County real estate companies, their principals, and the Pennsylvania company that constructs prefabricated housing, entered into a consent decree with the United States, resolving the allegations of discrimination on the basis of disability.

B. The investigation and litigation

The United States Attorney's office began investigating the Meadows after two local advocacy groups, Eastern Paralyzed Veterans Association (EPVA) and Long Island Housing Services (LIHS), contacted the U.S. Attorney's Office for the Eastern District of New York concerning the Meadows' lack of accessibility. The Civil Rights Litigation Section of that office enjoys good working relationships with these groups. For example, prior to the Meadows investigation, the Civil Rights Litigation Section had worked on several Fair Housing Act "pattern or practice" cases involving race, familial status, and handicap discrimination with LIHS and had frequently exchanged information on matters of local concern with EPVA.

Defendants initially cooperated in the investigation, providing requested documents, including floor plans, the Meadows' cooperative offering plans, and the contract between the developer and the company that constructed the prefabricated housing. They also permitted examination of the common areas and each type of ground floor apartment at the Meadows. AUSA Tepper conducted that examination accompanied by a consultant, an architect with expertise in the Fair Housing and Americans with Disabilities Acts, and EPVA's expert on building codes and compliance. This on-site investigation confirmed the inaccessibility of the newly constructed multifamily complex and sharpened discovery requests and relief proposals.

When efforts to resolve the matter without litigation failed, the United States filed its action. EPVA and LIHS filed a separate related action.

Both suits were assigned to the same judge. Filing separate suits allowed the plaintiffs to develop a joint strategy and conduct depositions together, while maintaining control over their respective suits. The separate suits also allowed the United States to avoid becoming enmeshed in defendants' largely unsuccessful efforts to dismiss the private plaintiffs' lawsuit on standing grounds. *See EPVA v. Lazarus-Burman Assoc.*, 133 F. Supp. 2d. 203 (E.D. N.Y. 2001) (ruling on standing and statute of limitations issues in private suit).

C. Discovery

Modular construction issues. This litigation is the first in the nation to charge a company that designs or constructs modular or prefabricated homes with violating the Fair Housing Act's accessibility requirements. As distinct from "stick-built" construction, which is built on site, modular or prefabricated housing is built in a factory. The Fair Housing Act does not exempt modular or fabricated housing from coverage.

Defendants did not deny that the Meadows failed to comply with the Fair Housing Act. Rather, they argued that the accessibility requirements do not apply to modular or prefabricated housing or to those who design or construct such housing. They also claimed that the modular housing at the Meadows could not be built in compliance with the Act's accessibility requirements. Simplex Industries, the company that constructed the modular units, maintained that it did nothing more than supply a component part to its codefendants, the developers. According to Simplex, responsibility for design and construction rested solely with the developers of the Meadows.

Because of the novelty of the issues related to modular construction, much of the discovery focused on the design and construction of modular housing generally, and more specifically, on Simplex's role in this project. AUSA Tepper reviewed trade materials on modular construction in preparation for depositions and in advance of serving discovery requests. The documents, deposition testimony, and responses to interrogatories demonstrated that the Meadows' modular construction did not render compliance

with the accessibility requirements impossible or even difficult. They also proved that Simplex did far more than build a component part: it built the units in the factory, delivered them to the site, and then supervised their construction. Indeed, Simplex employed a full-time project superintendent who lived on site and supervised a crew responsible for erecting the buildings. In short, the discovery established that Simplex's role at the Meadows was indistinguishable from that of a general contractor. Testimony of Simplex's engineer also confirmed that Simplex played a significant role in the project's design. Simplex's liability for design and construction did not, however, diminish the liability of the developer and its principals. *See, e.g., United States v. Hartz Construction Co., Inc.*, 1998 WL 42265 at 1 (N.D. Ill.) (where more than one party was involved in the design and construction of a particular aspect of an apartment complex, court found joint and several liability of all defendants).

Treatment of customers. AUSA Tepper's discovery also explored defendants' treatment of purchasers and potential purchasers with disabilities. Defendants repeatedly claimed that they received only one request for a ramp and provided that ramp expeditiously to the unit purchaser without charge. They further claimed that they "went out of their way" to accommodate every purchaser. The discovery established that defendants provided a ramp many months after the purchaser requested it, and only after the purchaser threatened litigation and entered into a confidentiality agreement. It also confirmed that defendants offered, for a fee, a "handicap options package" which included features of accessible design that should have been included in the units without an additional charge.

Corporate structure and assets. AUSA Tepper also conducted substantial discovery on matters not unique to accessibility cases, such as the defendants' corporate structure and assets. Such discovery is essential for establishing liability and entitlement to damages.

D. Proffered defenses

All defendants raised a variety of other defenses commonly asserted in design and construction cases. For the reasons stated below, none of them had merit.

Compliance with local and state law. Defendants argued that they consulted with local building officials and complied with all applicable state and local building codes. Compliance with state and local building codes less restrictive than the Federal Fair Housing Act does not constitute compliance with the Fair Housing Act. *See* 42 U.S.C. § 3604(f)(5)(A). While local building officials may review newly constructed multifamily dwellings to determine whether they comply with the "design and construction" requirements of the Act, 42 U.S.C. § 3604(f)(5)(B), the statute makes clear that "[d]eterminations of compliance or noncompliance by a State or a unit of general local government are not conclusive. . . ." 42 U.S.C. § 3604(f)(6)(B).

Insufficient public notice of the requirements. Defendants quickly blamed their lack of compliance with the Act's design and construction requirements on HUD's alleged failure to educate defendants as to these requirements. Neither the Act nor its legislative history suggest that Congress intended to make HUD's education of the building industry a condition precedent to enforcement of the Act's accessibility provisions. *HUD v. Arave Construction Co., Inc.*, HUDALJ 10-99-0308-8, slip op. at 2 (Nov. 15, 2001) (rejecting contention that any failure of HUD to educate construction and design professionals about the Act's access requirements bars lawsuit under the Act). Furthermore, the Act's accessibility requirements may be violated whether or not the violator specifically intended to do so. Those involved in the design and construction of multifamily dwellings are charged with constructive knowledge of the Act and its regulations. *Id. Accord: HUD v. Russell*, HUDALJ 10-99-0290-9, slip op. at 2-3 (Nov. 30, 2001).

Not within purview of the Act. Defendants also argued that the Meadows is not multifamily housing covered by the Fair Housing Act.

Defendants maintained that the complex consists of single story dwellings separated by fire walls. Under the Act, buildings having four or more units within a single structure separated by fire walls are covered multifamily dwellings and are required to be accessible. 24 C.F.R. Ch.I, App. IV to Subchapter A, § 1(1)(c).

No need for accessibility. Defendants repeatedly maintained that the purchasers of units at the Meadows were "active seniors" not interested in or in need of accessibility features. For example, one of the principals testified on deposition, "The people that live there don't want the ramps. They don't want the stuff you are talking about." The Act, however, does not make compliance contingent on the wishes of those designing, constructing or purchasing the housing. Even assuming that the United States had located no one injured by the complexes' inaccessibility, this suit was not barred. The Act authorizes the Attorney General to bring suit if he has reasonable cause to believe that any person is engaged in a pattern or practice of resistance to the full enjoyment of any rights granted by the Act, or that any group of persons has been denied rights granted by the Act and such denial raises an issue of general public importance. 42 U.S.C. § 1614(a). *See e.g., United States v. Pelzer Realty Co.*, 484 F.2d 438, 444 (5th Cir. 1973); *Hartz Construction Co., Inc.*, 1998 WL 42265 at 2 (design and/or construction of housing that is inaccessible under the Act denies persons with disabilities rights granted by the Act and raises an issue of general public importance and to contend otherwise is "totally myopic or worse").

E. Summary judgment

At the conclusion of discovery, AUSA Tepper prepared to move for summary judgment on behalf of the United States. EPVA and LIHS also moved for summary judgment. Under local E.D.N.Y. rules, the Court determines whether to permit summary judgment motions only after the moving party serves its statement of material facts not in dispute, and the opposing party serves a counter statement. The United States served the defendants with its statement of material facts. In its counter statement, Simplex Industries admitted to almost all the facts alleged by the United States, leaving no genuine triable issues of fact. The developer

and its principals requested additional time in which to respond. During this additional time, the parties met with the Magistrate Judge and Judge, and with the Court's assistance, ultimately reached a settlement.

F. The Consent Decree

The consent decree requires the defendants to pay \$300,000 to a fund administered by the United States, LIHS and EPVA, to be used to make the units at the Meadows accessible to individuals who use wheelchairs. The defendants are also enjoined from again violating the Fair Housing Act's accessibility provisions. They must certify to the U.S. Attorney's Office that any future construction complies with the Act and include in their advertising a statement that their multi-family housing is accessible to persons in wheelchairs. Defendants must also comply with other record-keeping and reporting requirements. Under the decree, after three years, monies remaining in the fund will go to EPVA, LIHS, and a third organization to be selected by the United States, for the purpose of furthering fair housing for persons with disabilities.

AUSA Tepper is currently working with EPVA and LIHS to implement procedures for administering the consent decree and for installing ramps and providing ground floor homeowners with modifications to their apartments.

IV. Conclusion

These lawsuits by AUSA's and the attorneys in HCE should serve notice to builders, architects, and developers that those who do not design and construct housing in compliance with the Federal Fair Housing Act will face legal action.

AUSA's may obtain a copy of the internal training manual prepared by HCE by contacting:

Jeanine Worden
Deputy Chief
Housing & Civil Enforcement Section
Civil Rights Division
United States Department of Justice
1800 G Street, N.W. Rm. 7046
Washington, D.C. 20006
(202) 307-6556
(202) 514-1116 (fax)
Jeanine.M.Worden@usdoj.gov

ABOUT THE AUTHORS

□ **Joan Laser** is an Assistant U.S. Attorney in the U.S. Attorney's Office for the Northern District of Illinois. Her practice since 1996 consists entirely of affirmative civil rights litigation. In 1997, she received a Special Commendation Award from the Department's Civil Rights Division for her work in civil rights enforcement.✉

□ **Marla Tepper** is an Assistant U.S. Attorney in the Civil Rights Litigation Section of the U.S. Attorney's Office for the Eastern District of New York. She has served in this capacity since 1996. Prior to joining the U.S. Attorney's Office, Marla was an Assistant Attorney General in the Civil Rights and Consumer Frauds Bureaus of the New York State Attorney General's Office.✉

Eliminating Structural Barriers to Access in the Built Environment

Zita Johnson-Betts
Supervisory Attorney
Disability Rights Section

I. Introduction

James DePreist, a symphony conductor, became a person with a disability at the age of twenty-six when he contracted polio while conducting in Bangkok, Thailand.

Overnight, my world changed . . . Suddenly, walking was a challenge, stairs loomed large, and concert halls without ramps were everywhere. As obstacles I'd never noticed before became a part of my daily life, I quickly learned that the intentional walls of discrimination and the physical barriers confronting people with disabilities have the same effect. Both deny access.

Videotape: *My Country: The Civil Rights Movement That Created the Americans with Disabilities Act* (produced by Ward & Associates 1996).

Nine-year-old Freddy Ramirez, who has cerebral palsy, used a wheelchair to get around River Terrace Elementary School in Washington, D.C. The school lacked an accessible restroom, however, and Freddy was frequently reduced to crawling across the floor on his hands and knees to use the toilet. 'It was very hard for me,' Freddy said. 'I had to

leave the wheelchair outside, crawl to the bathroom, then crawl back to the wheelchair. . . . Sometimes kids wouldn't flush the toilet and I would have to do it. So that made me feel bad. And sometimes it was slippery and I couldn't reach the toilet. And I'd have accidents. Sometimes I even got in trouble for it by the teacher.'

Valerie Strauss and Debbi Wilgoren, *Judge Tells School to Fix Bathrooms*, Wash. Post, Oct. 20, 1999, at A1, discussing *Alvarez-Hernandez v. District of Columbia*, Civ. No. 99-803, Order & Mem. Op. (D.D.C. October 14, 1999).

Persons without disabilities often do not appreciate the extent to which structural barriers in the built environment pose a serious impediment to the full integration of people with disabilities into society, especially persons with mobility or visual impairments. Common structural barriers to access—such as stairs, sidewalks without curb ramps, narrow parking spaces without access aisles, and inaccessible toilets—deny them equal access to goods, services, employment, and educational opportunities, thereby perpetuating a cycle of isolation, poverty and dependence.

II. Eliminating structural barriers to access in existing facilities, altered or renovated facilities, and newly-constructed facilities

Under authority granted by titles II and III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-89, the Civil Rights Division has promulgated regulations ensuring, among other things, that buildings and other facilities are constructed or altered in a manner that provides access to persons with disabilities. The title II regulations cover state and local government facilities, such as public schools, public libraries, and the offices of public agencies. *See* 28 C.F.R. pt. 35. The title III regulations cover public accommodations (*i.e.*, businesses that are open to the public, such as restaurants, motels, and doctors' offices) and commercial facilities (*i.e.*, businesses that are places of employment, such as office buildings, factories, and warehouses). *See* 28 C.F.R. pt. 36.

Overall, the ADA requirements for existing, unaltered facilities are not as stringent as those for altered, renovated, or newly-constructed facilities. The different requirements recognize that retrofitting may be quite expensive in existing facilities. With respect to altered, renovated, or newly-constructed facilities, however, accessibility can easily be incorporated into the initial stages of design and construction without a significant increase in cost.

With respect to existing, unaltered facilities, the title II regulations mandate that programs and services offered by state and local governments be made accessible, while the title III regulations mandate that public accommodations be made accessible. (The title III regulations governing existing, unaltered facilities do not apply to privately-owned commercial facilities that do not contain places of public accommodation. 28 C.F.R. pt. 36, subpart C.) To make such facilities accessible, it may be necessary to take affirmative steps to remove existing barriers.

Structural barriers that prevent persons with disabilities from entering and using existing public accommodations must be removed when such removal is "readily achievable," *i.e.*, when it can be done without much difficulty or expense. First priority should be given to measures that will

enable persons with disabilities to get in the front door. Second priority should be given to measures that will afford access to the areas in which goods and services are offered. When readily achievable, barrier removal measures must comply with the more stringent ADA regulations governing alterations. 28 C.F.R. § 36.304.

As noted above, private entities operating commercial facilities that do not contain places of public accommodation are not required to remove structural barriers in existing facilities. However, such businesses must comply with ADA regulations establishing standards for accessible design when they alter, renovate, or expand their facilities. *See* ADA Standards for Accessible Design (ADA Standards), 28 C.F.R. pt. 36, app. A (applies only to new construction, additions, and alterations). A proposed revision to the architectural guidelines on which the ADA Standards are based has been published by the U.S. Access Board, but will require further governmental action to finalize, and a separate rulemaking procedure by the Department of Justice before changes in the ADA Standards can become effective.

III. Common structural barriers to access

There are many different types of barriers that deny access to persons with disabilities. Some of the most common barriers—barriers that go unnoticed by persons without disabilities—include: dangerously steep ramps, sidewalks without curb cuts, parking spaces without appropriately designed access aisles, and inaccessible restrooms and toilets. The paragraphs below briefly describe some of these common structural barriers to access and the corresponding ADA Standards that redress the problem.

- *Parking*

Standard parking spaces are a barrier to people with mobility impairments who use wheelchairs because there is insufficient space to enable a person with a disability to transfer from a car to a wheelchair or to use a lift to get out of a van. The ADA Standards address this issue by requiring covered entities to provide designated accessible parking spaces and adjacent access aisles. If an accessible parking space and its adjacent access aisle are not level in all directions,

or if a raised curb ramp extends into the access aisle, a person may have difficulty transferring from his or her vehicle to the wheelchair. A sloped surface can also prevent a wheelchair lift from being fully lowered to the access aisle. To remedy this situation, the ADA regulations that establish accessible design standards for new construction, additions, and alterations mandate that accessible parking spaces and access aisles be level with surface slopes in all directions. ADA Standards, §4.6.3.

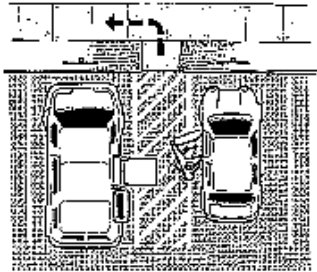


Figure 1 - Two accessible parking spaces with shared access aisle that is part of an accessible route

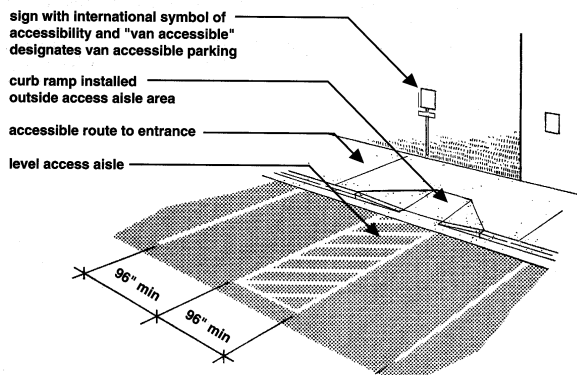


Figure 2 - Van accessible parking space with flared-side curb ramp located outside of the access aisle

- *Exterior routes located at a facility*

Persons using wheelchairs, scooters, or walkers require not only accessible parking for vans and automobiles, but also an accessible route leading from the accessible parking area to the accessible entrance of a building or other facility. This is why the ADA regulations require that the access aisle of an accessible parking space be part of an accessible route. An accessible route within the boundary of the site must also be provided for persons with disabilities who enter the site from a public transportation stop, a passenger loading zone, or a public street or sidewalk. ADA Standards, §§ 4.1.2(1), 4.3, 4.6.3.

- *Sidewalk curb ramps*

The existence of a curb ramp leading from a street crosswalk to a sidewalk, for example, is not sufficient, in and of itself, to ensure accessibility. Curb ramps must be designed and constructed with the safety of both ambulatory people and wheelchair users in mind. Thus, if a curb ramp is located where pedestrians or wheelchair users must travel across it, ADA regulations require that the sides be flared, and that the slope of the flare not exceed 1:10. Steep, unflared sides must be protected by planters, handrails, etc. This ensures that pedestrians do not trip over, and wheelchairs do not tip over, steep unprotected ramp sides. ADA Standards, § 4.7.5.

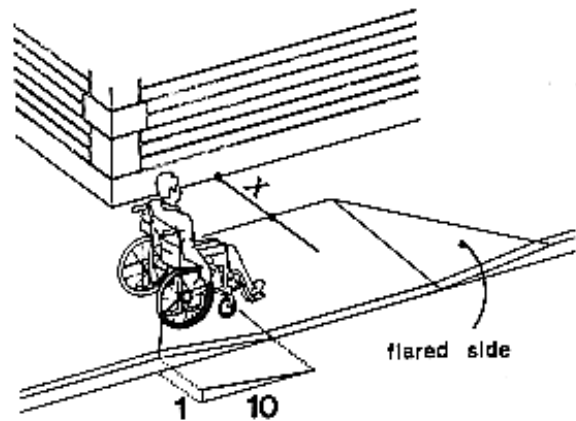


Figure 3 - Flared-side curb ramp used when people can approach ramp from sides

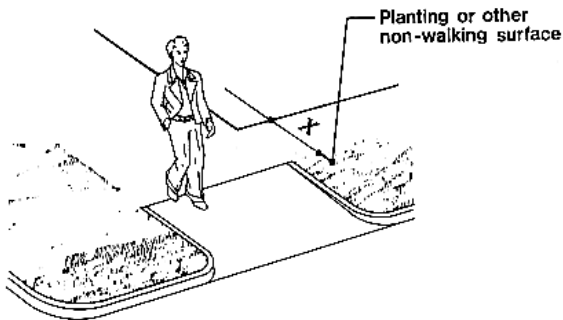


Figure 4 - Curb ramp with vertical sides protected by planting used when people cannot approach ramp from sides

- *Ramps*

When the slope of a walkway or pedestrian route is too steep (*i.e.*, exceeds 1:20), it is difficult for persons with mobility impairments to use the route without additional design features. A person using a wheelchair will find it difficult to maintain control of the wheelchair without the assistance of handrails. In addition, a person may become injured if his or her wheelchair rolls off the side of a route that does not have edge protection. People who use crutches, a cane, or a walker, may also suffer injury if they lose their balance and fall on a route that is too steep and that is without handrails and edge protection. The ADA regulations provide that any portion of an accessible route that exceeds a 1:20 slope is a ramp, and must satisfy the ADA Standards for ramps. These Standards dictate ramp width, slope and rise, and walking surface. They also require handrails, landings at the top and base of the ramp, and edge protection. ADA Standards, § 4.8.

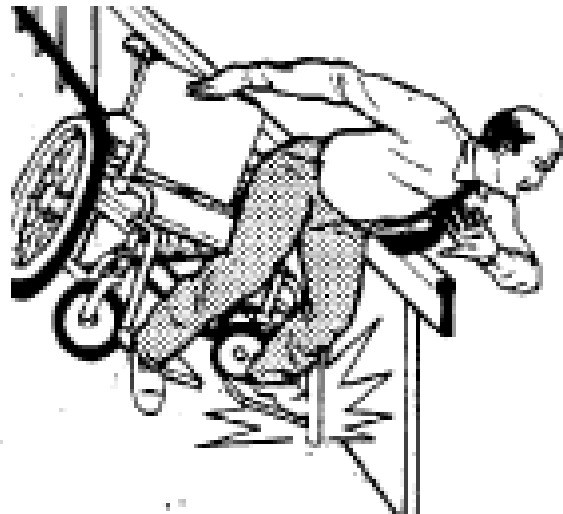


Figure 5 - Ramp with no edge protection

Sometimes, in an effort to provide access for persons who use wheelchairs, a ramp will be installed that cannot be used by the persons for whom it is intended because it does not satisfy the ADA Standards. This can occur for a variety of reasons. For example, a ramp may be unusable because it has landing areas where the ramp changes direction (*i.e.*, switchbacks or 90-degree turns) that are too small and do not provide enough space for the wheelchair user to make a turn on a level surface. To prevent this problem, the ADA Standards require that—where a ramp changes direction at a landing—the landing size be at least sixty inches by sixty inches. ADA Standards, § 4.8.4 (3).

- *Public restrooms and toilet stalls*

Some facilities provide multiple public restrooms for persons without disabilities, while restricting persons with mobility impairments to a limited number of public restrooms. The person with a disability may be required to travel long distances to get to an accessible public restroom. ADA regulations require that each public restroom be accessible. ADA Standards, § 4.1.3(11).

Persons who walk with crutches, a cane, a walker, or have limited balance generally find it easier to use an "ambulatory" toilet stall that allows them to use their arms to lower themselves

onto the toilet seat. Unfortunately, few public restrooms make such stalls available. ADA regulations require that public restrooms with six or more stalls provide, in addition to the standard accessible stall for wheelchair users, at least one stall that is thirty-six inches wide with an outward swinging, self-closing door and parallel grab bars. ADA Standards, § 4.22.4.

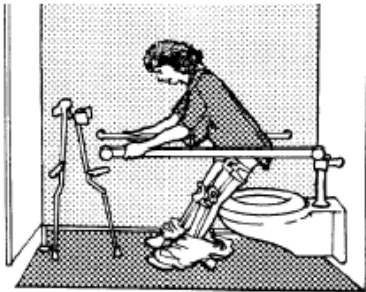


Figure 6 - Thirty-six inch wide "ambulatory" toilet stall with parallel grab bars used in addition to wide accessible stall

A person using a wheelchair cannot open the door to an otherwise accessible toilet stall unless there is a clear level area in front of and adjacent to the door that provides a place to maneuver. ADA regulations require that toilet stall doors, including door hardware, comply with ADA Standards, § 4.13.

- *Circulation paths*

People who are blind, or who have visual impairments, can be seriously injured when they cannot detect an object in their path by sweeping their cane. This can occur when an object protrudes into a circulation path from the side. It can also occur when an object overhangs a circulation path from above without sufficient headroom under which the person may pass without contact.

To avoid this situation, the ADA regulations mandate that objects that protrude from walls and that have leading edges located between twenty-seven inches and eighty inches from the finished floor protrude no more than four inches into

walks, halls, corridors, passageways, or aisles. ADA Standards, § 4.4.1. Objects with leading edges mounted at or below twenty-seven inches can be detected by the sweep of a cane and their protrusion is not limited.



Figure 7 - Objects mounted above twenty-seven inches and that protrude more than four inches into the circulation path are hazards

With regard to headroom, the minimum clear headroom is eighty inches above the finished floor. If headroom of an area adjacent to an accessible route is less than eighty inches, a warning barrier must be provided. ADA Standards, § 4.4.2.

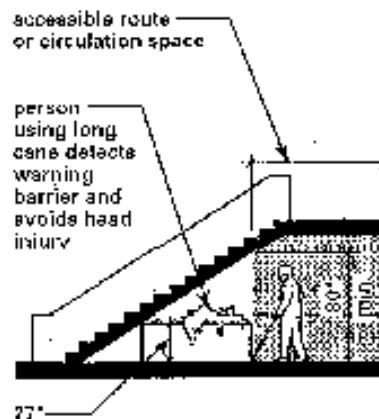


Figure 8 - Cane-detectable barrier warns blind people when vertical clearance is less than eighty inches

In summary, barriers such as those described above present significant problems for persons with disabilities. The best practice is to avoid structural barriers to accessibility in the first instance by complying with the ADA Standards in the early design and construction stages. However, design and construction professionals are often unfamiliar with the requirements of federal law, as they generally rely on state and local building codes and the officials who enforce them. Recognizing this, the Civil Rights Division has been encouraging state and local governments to incorporate the ADA standards, or their equivalent, into state and local building codes.

IV. Encouraging state officials to seek DOJ certification of state building codes

Most states have adopted general building and construction codes specifying design and construction standards that are enforced by state and local officials. A growing number of these codes include provisions mandating some level of accessibility for persons with disabilities. The Civil Rights Division believes that such building codes represent a special opportunity to promote voluntary compliance with ADA regulations governing the construction of new, and the alteration of existing, title III facilities that should be enthusiastically pursued.

The ADA's enforcement scheme includes a provision under which a state government may ask the Assistant Attorney General for the Civil Rights Division to certify that its accessibility requirements meet or exceed federal accessibility standards. 42 U.S.C. § 12188(b)(1)(A)(ii). This voluntary certification program facilitates compliance with the ADA in two ways. First, it allows architects and builders to refer to state laws, with which they are already familiar. H.R. Rep. No. 101-485(II), at 126 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 409. Second, in ADA enforcement litigation, compliance with certified state accessibility requirements constitutes rebuttable evidence of compliance with federal accessibility standards. 42 U.S.C. § 12188(b)(1)(A)(ii).

To date, the Civil Rights Division has certified the accessibility laws of Florida, Maine, Texas, and Washington, and is currently

reviewing certification requests submitted by California, Indiana, Maryland, New Jersey, and North Carolina. Minnesota, New Hampshire, New Mexico, and Utah have, in the past, expressed strong interest in obtaining certification and have submitted information to the Division in that regard. Arizona, Georgia, Idaho, Louisiana, Michigan, New York, North Dakota, South Carolina, Virginia, and West Virginia have expressed some interest in certification, often informally, but have not submitted a certification request to the Civil Rights Division. It is unclear whether the remaining states might be interested in the certification program. The Civil Rights Division plans to contact all of the states that have not obtained, and are not actively seeking, certification for purposes of encouraging them to explore this option. AUSAs can help by bringing the certification program to the attention of appropriate state officials with whom they may come into contact.

V. Conclusion

We can help persons with disabilities break the cycle of isolation, poverty, and dependence by ensuring that they have equal access to buildings and other facilities offering goods, services, employment, and educational opportunities. AUSAs can promote such accessibility by aggressively enforcing the ADA through negotiation, settlements, and litigation that seek to remove existing structural barriers and to ensure adherence to the ADA Standards governing the alteration of existing facilities and the construction of new facilities. AUSAs can also promote accessibility on a somewhat broader scale by encouraging state building officials to request information from the Civil Rights Division about the advantages of obtaining a certificate of ADA equivalency for the accessibility provisions of a state building code.

❖ ABOUT THE AUTHOR

Zita Johnson-Betts joined the Civil Rights Division in 1983 through the Attorney General's Honors Program, serving until 1984 in the Coordination and Review Section, which then had

responsibility for coordinating government-wide the administrative enforcement of Section 504 of the Rehabilitation Act. From 1984-1993 she served as a trial attorney in the Division's Educational Opportunities Section, Employment Litigation Section and Voting Section, and from 1993-1996 as an Attorney Reviewer in the Voting Section. From 1996-2000, she served as Deputy Chief in the Voting Section with primary responsibility for the administration of Section 5 of the Voting Rights Act. Ms. Johnson-Betts has been with the Disability Rights Section since October 2000. ☒

Enforcing Disability Laws: A Personal Perspective from Two AUSAs

As all of the articles in this issue illustrate, enforcing the American with Disabilities Act (ADA) and the Fair Housing Act produces enormous benefits to the community at large. It opens up an accessible world for persons with disabilities to enjoy and integrates persons with and without disabilities for a more diverse nation. Disability rights enforcement also has unique benefits for the Department of Justice, U.S. Attorneys' Offices, and the Assistant U.S. Attorneys and others who undertake these cases. What follows are perspectives from two Assistant U.S. Attorneys who have handled ADA and Fair Housing cases, lessons they have learned, and what they and their offices have gained from their experiences.

Learning How and Why to Change the World

Gary Vanasek
Assistant United States Attorney
Western District Tennessee

For several years now, I have been spending an increasing amount of time handling ADA, and, to a lesser extent, Fair Housing Act cases under programs guided by the Disability Rights and Housing and Civil Enforcement Sections of the Civil Rights Division. As a civil AUSA, I have found the opportunity to enforce these important civil statutes to be both interesting and rewarding. The purpose of this article is to share our office's experience working on these cases in hopes that other U.S. Attorneys' Offices and other AUSAs will come to understand and appreciate the value to the community that can be derived from enforcing the ADA and Fair Housing Act.

In 1998, then Attorney General Janet Reno called upon Civil Chiefs to assist the Disability Rights Section (DRS) with a comprehensive effort to enforce the provisions of Title II of the ADA with respect to 9-1-1 centers across the country. At that time, I had no understanding of the Department's responsibility for enforcing the ADA and initially did not fully appreciate the significance of such enforcement efforts to the fundamental ability of many citizens to conduct everyday transactions and participate fully in society. Following the 9-1-1 Project, DRS invited U.S. Attorneys' Offices to become partners in an expanded enforcement effort. A number of offices around the country, including ours, responded to this call, received training, and began handling cases. Two U.S. Attorneys and the Civil Chief have been extremely supportive of this effort.

Our office participated in the effort to ensure 9-1-1 centers could receive and field calls from persons with hearing impairments to the same extent the centers handled calls from the public at large. The tremendous obstacles encountered daily by individuals with disabilities were not always apparent to me, however, until I heard the story of a young man with paraplegia who literally could not get through the twenty-four-inch wide door of a restroom at a local fast food restaurant. As a result of this barrier, this man, whose job involved driving rental cars back and forth between branch offices, soiled himself and the car he had driven to the Wendy's, and humiliated himself in front of his employer and his colleagues.

I quickly realized that the many things I took for granted were not available to people with mobility impairments simply because a ramp did not exist, a door was too narrow, or a restroom toilet stall was not large enough to accommodate a wheelchair. We intervened in the case filed by this young man and ultimately reached an agreement with a Wendy's franchisee who operates fifty-four restaurants. Pursuant to the agreement, a variety of improvements are being made in every one of the fifty-four restaurants, ranging from the installation of ramps, new doors, new water closets and accessible tables, to the removal of stalls, customer queues, and other barriers to access.

Since the Wendy's case, we have opened investigations of two other fast food chains focusing on physical barriers to access, negotiated a consent decree with a chain restaurant to ensure that persons with service animals are welcome in its restaurants, and negotiated a consent decree with an apparel retailer on the removal of turnstiles. We are also working with the Housing and Civil Enforcement Section on a case involving physical barriers to access at three different apartment complexes and have initiated an investigation of three new apartment complexes.

Having said all this, it should be acknowledged that enforcement of the ADA is not an assigned responsibility of U. S. Attorneys. Moreover, many Civil Divisions across the country have a very full caseload, representing the interests of the government in civil defensive cases and Affirmative Civil Enforcement cases. It is also important to acknowledge that the allocation of civil AUSAs varies greatly among offices and that the nature and size of caseloads also differs significantly from office to office. Nevertheless, the Americans with Disabilities Act and the Fair Housing Act, as amended, represent important efforts to end discrimination and can add a new dimension to the Civil Division of every U.S. Attorney's Office. Participating in the ADA and Fair Housing enforcement programs offers U.S. Attorneys and their Civil Divisions the opportunity not only to enforce important federal laws, but also to have a positive impact on the quality of life enjoyed by persons with disabilities. Clearly any barrier removed broadens the opportunity for persons with disabilities to participate more fully in society. In addition, our office has benefitted from favorable media attention given to cases we have resolved, which has helped the public understand the multifaceted efforts of the U.S. Attorney's Office

Depriving persons with disabilities of the opportunity to participate fully in the social life of a community and to access goods and services available to the general public devalues them as human beings as surely as depriving a person of the same opportunities based on their race or sex. If you doubt the importance of this effort, I would invite you to spend a couple of days in a

wheelchair going about your daily business. You will undoubtedly encounter many obstacles that either entirely prevent you from doing what you planned or cause you to spend considerable time and physical effort to find a way around the obstacles you encounter. The same would, no doubt, be true if you attempted to duplicate the experience of not being able to hear or see. Your inability to participate in, or benefit from, so many of the things which add to the enjoyment of life will erase any of the doubts you may have had about the significance of becoming involved in the enforcement of the ADA and the Fair Housing Act.

As with any new area of law, there will be much to learn before commencing an investigation or compliance review. Part of that learning process will involve understanding the distinction between the requirements imposed on state and local governments under Title II of the ADA and the requirements imposed on public accommodations (retail stores, hotels, restaurants, auditoriums, museums, etc.) under Title III of the ADA. In addition, the standard for removing barriers in buildings housing places of public accommodation built before January 26, 1993, differs from the standard for buildings opened for first occupancy thereafter. The ADA Standards for Accessible Design, found at 28 C.F.R. Pt. 36, App. A, are very detailed architectural specifications that require some study and application before you will have a good understanding of what is required in specific situations. DRS has a staff architect to assist you in your investigations, but your handling of these matters will benefit from your own independent understanding of ADA requirements. It is also important to understand that, at least initially, you will most likely have to do some of your own investigation. Doing this leg work will help you understand, as a practical matter, what the problems are with a given barrier and its removal. On the other hand, some AUSA's may find that taking measurements in restrooms is not a good use of their time. Consequently, paralegals or ACE investigators are often used to perform many of these functions. As our efforts have evolved, we are beginning to rely more and more on the expertise of architects, because things that initially appear to be straightforward are often more

complex than we realize. Furthermore, serious negotiations, not to mention litigation, will require findings supported not by an AUSA with a measuring tape, but by a professional well-versed in the requirements of the Standards.

You will also have to consider how to select matters to investigate. Generally, DRS will refer matters based on complaints it has received directly from citizens in your district. Additionally, we have established a good working relationship with a local advocacy group that is part of a network of Centers for Independent Living across the country. This group and its members have proven to be a fertile source of well-documented complaints over the past several years. Finally, if you bring a matter to conclusion that receives attention from the press you will no doubt begin to receive calls and letters directly from people seeking help.

To assist in learning the law, DRS has developed some very good training materials, and it periodically supports or presents training events. In addition, DRS staff members are available to provide advice, sample documents, and technical expertise. Much like a client agency, DRS will provide guidance on settlement negotiations to ensure that Department policy is applied uniformly across the country. In addition, because DRS is responsible for enforcement of the ADA and because we are in the role of plaintiff in such cases, it is necessary to obtain written approval from the Assistant Attorney General for Civil Rights before filing a complaint. DRS staff will guide you in the drafting of all the appropriate documents and will shepherd your proposed case through the AAG's office.

I have enjoyed my work on ADA and Fair Housing cases and continue to learn new things every day. I believe we have accomplished some results that have improved the quality of life for countless individuals. It is my hope that AUSAs in your Civil Division will become part of the U.S. Attorney Program for ADA Enforcement. ♦

ABOUT THE AUTHOR

□ Gary Vanasek has been an Assistant U.S. Attorney in the Western District of Tennessee since 1986. Since joining the U.S. Attorney

Program for ADA Enforcement, Gary has intervened in and settled: *Cunningham v. The Public Eye*; *Perkins v. Valenti Mid-South Management*; *Bell v. Captain D's*; and *Colsey v. Norstan Apparel Shops*, as well as investigating and informally resolving several other matters. Gary and his colleague Harriet Halmon received a Special Achievement Award in October 2000 for their ADA work.✉

Lack of Access: As Invidious As Any Other Discrimination

Nancy Griffin
Assistant United States Attorney
E.D. Pennsylvania

Like Gary, I was asked to write an article on why I enjoy doing cases in the area of disability rights. I would have preferred a less subjective topic, something mechanical, like how to determine if a bathroom is accessible. Explaining why these cases are important to me gets into my values and experiences and risks becoming preachy.

I learned that people tend to segregate themselves based on perceived differences until they get to know each other. In the '70s, I became friends with a couple, both of whom were blind, and we began going to dinner. The typical response of the waiter was to pretend that my friends weren't there, probably not out of meanness, but because he did not know how to behave. It bothered me that this professional couple was sidelined because they were perceived as being different.

Years later, someone dear to me was diagnosed with a neurological disorder that all too quickly left her unable to walk. An honor graduate of a top college with a professional degree, she was reduced to combing the city for one of the few condominiums where she could fit her electric scooter through the doors, maneuver through the unit, reach the kitchen appliances, and thus, retain her independence. When we wanted to go out to a restaurant, I quickly learned that I couldn't just

call ahead to see if the restaurant was accessible, I had to visit, since many public establishments seem to have no real concept of what is required for a bathroom or dining room to be accessible. I also saw how painful being excluded can be, whether the barriers to access were intentionally placed or not. What's worse is the lack of public outrage or even awareness. I remember my parents' stories of life in the Jim Crow south and being restricted to the balcony in the movie theater. How many of the new stadium-style movie theaters limit the wheelchair accessible seats to the bottom tier where you are virtually on top of the screen?

I welcomed the passage of the Americans with Disabilities Act. It provided a tool, a means to fight for change. The United States Attorney and Civil Chief in the E.D. Pennsylvania are committed to affirmative litigation and allow time to work on these cases.

Like all civil rights statutes, it takes time and education to turn the promise of the ADA into reality. The Department is empowered to review entities' compliance without receiving a complaint from the public. Three new hotels in Philadelphia were reviewed for compliance with the ADA and all three had violations. The worst provided no means for a wheelchair user to leave the parking garage other than in the same traffic lanes used by motor vehicles. That hotel is now open, a showplace, and accessible. I have also surveyed several new apartment/condominium complexes in the district for compliance with the Fair Housing Act's accessibility requirements. We found that all but one were not in compliance, even though the requirements are fairly minimal. Doors need to be wide enough to get through. Bathroom walls must be reinforced so that they can support grab bars. The abysmal rate of noncompliance that I found in this area is in keeping with two other surveys that were conducted in Baltimore and Chicago.

There are other types of issues. A gentleman who has a hearing impairment shared with me the trauma of having heart surgery while he was awake without a sign language interpreter present. Yet he was expected to communicate with the medical staff at certain points in the procedure. He had to signal for a nurse to leave her mask down

so that he could read her lips, and they communicated as well as they could under the circumstances. I am hoping someday to bring a good test to litigate the issue of when a medical provider must supply an interpreter.

On a personal level, I like feeling that I'm making a positive difference and that the results will outlast my tenure as an Assistant. As frustrating and intimidating as learning the architectural standards for accessible design can be, being able to use them to accomplish the end goal of accessibility gives a sense of accomplishment beyond defending the latest slip and fall accident. This is an area where we are breaking new ground and setting the standard.

Let me suggest another reason why others might want to work in this area. Any of us can have an accident that leaves us with a disability, and we are all getting older.

The ADA is not self-enforcing. More compliance reviews, more cases, and more public education is needed. The Department has enforcement powers and resources not available to the private litigant. As with civil rights initiatives of the past, whether it is voting rights or desegregation, as Department attorneys, we are and we should be the standard bearers. ❖

ABOUT THE AUTHOR

❑ **Nancy Griffin** joined the Department of Justice in 1978, in the Civil Division, Commercial Branch. In 1980, she became an Assistant U.S. Attorney in the Criminal Division of the U.S. Attorney's office for the District of Connecticut, moved to the Civil Division of that office in 1988, and relocated to be an Assistant U.S. Attorney in the Civil Division of the Eastern District of Pennsylvania in 1995. Nancy received a Special Achievement Award from the Civil Rights Division on October, 2001 for her ADA work. ❖

NOTES





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