

ADA Legal Updates

2020 and 2021 in Review

May 3, 2022

Presented by:
Barry C. Taylor
Rachel M. Weisberg





Agenda

- ▶ Definition of Disability
- ▶ Title I / Employment
- ▶ Title II / Public Entities
- ▶ Questions

Definition of Disability



COVID-19 as a Disability

Burbach v. Arconic Corporation

2021 WL 4306244 (W.D. Pa. Sept. 22, 2021)

- ▶ Employee developed 102-fever, exhaustion, difficulty breathing – diagnosed with COVID-19 and later fired
- ▶ **Court:** COVID can be a disability even if it is temporary and non-chronic
 - ▶ Duration is only one factor in assessment
 - ▶ Alleged substantial limitation in breathing

See also Brown v. Roanoke Rehab. & Healthcare Center, 2022 WL 532936 (Feb. 22, 2022, M.D. Ala.) (denying motion to dismiss and finding plaintiff pled that COVID-19 was an actual disability and that she was regarded as disabled due to COVID-19).



Title I (Employment)



Reasonable Accommodation

Bell v. O'Reilly Auto Enterprises

972 F.3d 21 (1st Cir. 2020)

- ▶ Store manager with Tourette's syndrome, ADHD and major depression had drastic increase in hours
- ▶ Asked for a cap on hours; denied and fired
- ▶ **Jury instructions:** Employees get accommodations only if **needed** one to do the job's essential functions
- ▶ **1st Cir:** Vacated – erroneous jury instruction
 - ▶ “An employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation.”
- ▶ Aug 2020: Supreme Court denied to hear the case
- ▶ Oct 2021: Jury found for employee



Interactive Process & Delays

McCray v. Wilkie

966 F.3d 616 (7th Cir. 2020)

- ▶ Case worker needed a replacement van to accommodate his physical disabilities; provided after 11 months
- ▶ **Dist. Court:** Granted motion to dismiss
 - ▶ Employee was accommodated; no viable claim
- ▶ **7th Cir:** Reversed and remanded (found for employee)
 - ▶ An unreasonable delay can amount to a failure to accommodate
 - ▶ Totality of circumstances: Good faith of employer; length of delay; reason for delay; nature/complexity/burden of request; whether alternatives were offered



Reassignment

Wirtes v. City of Newport News

996 F.3d 234 (4th Cir. 2021)

- ▶ Detective asked for accommodation (alternative to full police duty belt or other options)
- ▶ Before deciding on accommodation request, forced to decide whether to retire early or be reassigned
- ▶ **Dist. Court:** Found for employer - reassigned
- ▶ **4th Cir:** An employer fails to accommodate an employee when it forces a reassignment despite the availability of an accommodation in current position
 - ▶ EEOC and courts: Reassignment is “last resort”
 - ▶ Decision does not stop employers from reassigning employees who agree to a voluntary transfer



Remote Work

Peeples v. Clinical Support Options, Inc.

2020 WL 5542719 (D. Mass. Sept. 16, 2020)

- ▶ Assistant manager was high-risk for COVID due to asthma; approved for telework at the beginning of the pandemic; able to do essential functions from home
- ▶ Few months later, all managers required to return
- ▶ Employee renewed request; denied
- ▶ Filed complaint and motion for preliminary injunction
- ▶ **Court:** Ordered remote work for 60 days
 - ▶ Telework was reasonable, citing supervisor support
 - ▶ Unlikely that employer could show undue hardship
- ▶ **Dec 2020:** Case settled



Accommodating Hiring Process



Leskovisek v. Ill. Dept. of Transportation

2020 WL 7323840 (C.D. Ill. Dec. 11, 2020)

- ▶ Two men with autism did data entry as interns
- ▶ Asked for accommodation for State hiring process which required written test and structured interview
- ▶ Request denied and internship ended
- ▶ **Court:** Case to go to a jury
 - ▶ Defendants' failure to meaningfully respond prevented them from exploring accommodations (performance test, video resume)
 - ▶ Rejected argument that job coach made plaintiffs unqualified
- ▶ **Status:** Parties agreed to MOU to discuss policies

Service Animal-Related Accommodations



Schroeder v. AT&T Mobility Services, LLC

2021 WL 4942870 (M.D. Tenn. Oct. 22, 2021)

- ▶ Employee with PTSD, anxiety and depression asked for several accommodations to permit service animal on the job, including larger vehicle, LED lighting
- ▶ Request denied without cost analysis or alternatives
- ▶ **Court:** Case to go to a jury
 - ▶ Accommodation requests are not unreasonable because employee can physically do the job
 - ▶ Fact issues exist about whether at least some of the requests were reasonable – no cost assessment
 - ▶ Other coping methods do not alleviate symptoms

Set Schedules

EEOC v. Wal-Mart Stores East LP

436 F.Supp. 3d 1190 (E.D. Wis. 2020)

2022 WL 523767 (E.D. Wis. 2022)

EEOC press release

- ▶ Employee with Down Syndrome worked as a part time Sales Associate with set schedule for 15 years
- ▶ Walmart changed its scheduling process and automatically generated shifts; employee asked for consistent schedule
- ▶ **Court:** Case to go to a jury
- ▶ **Jury trial (2021):** Over \$125 million verdict
- ▶ **Equitable relief (2022):** Reinstatement with accommodations



EEOC Round up

EEOC v. Kaiser Foundation Health Plan (October 2021) -

Employee asked to use available non-revolving doors as revolving doors were traumatic for her; employer denied request. After the court ruled against employer, it agreed to pay employee \$130,000 and enter into a consent decree to train employees, change its employment forms, and EEOC monitoring

EEOC v. Lake States Lumber (May 2021) - Employee restricted from returning to work following heart surgery and then fired. Settled for \$100,000; modified “100% healed” policy; training and reporting



EEOC Round up

EEOC v. Sprouts Farmers Market (October 2021) -

Applicants never contacted after requesting ASL interpreters for interview. \$280,000 for three claimants, ADA policies, training, and letters of apology

EEOC v. Lonza America (July 2021) – Employee fired after testing positive for legally controlled substance; employer learned employee was participating in medication-assisted treatment program with a legal prescription for an opioid medication, he was forced into counseling with a clinical psychologist and his return-to-work conditioned on his discontinued use of the prescribed medication. \$150,000, training

DOJ Settlement Roundup

Port Authority Trans-Hudson Corp (Nov 2021)

- ▶ DOJ investigation found PATH was violating ADA and GINA by seeking improper medical and disability information from its workers.
- ▶ Under the settlement agreement, PATH agreed to stop conducting unnecessary medical exams, train its staff on ADA and GINA, and pay a total of \$100,000 to employees harmed by PATH's exams and inquiries.

Title II (Public Entities) + Title III Cases that Impact Public Entities



Court Access & Standing

Crawford v. Hinds Cty Bd of Supervisors

1 F.4th 371 (5th Cir. 2021)

- ▶ Resident with MS prevented from serving as a juror due to access barriers at local courthouse
 - ▶ Ex: main entrance not accessible; heavy doors at side entrance; main restroom not accessible; accessible restroom required bailiff to go through several locked doors; jury box up a step
- ▶ **Bench trial:** Courthouse not accessible, but plaintiff lacked standing (future jury service too speculative)
- ▶ **5th Cir:** Reversed and remanded (found for juror)
 - ▶ Substantial risk of being called for jury service
 - ▶ Barriers are systemic exclusion - ongoing threat
- ▶ **2021:** Consent decree re: court modifications



Accessible Pedestrian Signals



Amer. Council of the Blind v. New York

495 F.Supp.3d 211 (S.D.N.Y. 2020)

- ▶ Class of blind, low-vision NYC pedestrians sued for re: failure to provide non-visual crossing information
- ▶ Plaintiffs moved for summary judgment on liability
- ▶ **Court:** Grants summary judgment “in principal part”
 - ▶ Near-total absence of accessible signals denies pedestrians who are blind and low vision meaningful access to intersections (only about 5%)
 - ▶ City’s failure to add accessible signals when it installed new traffic signals after June 27, 2015 violated ADA and Rehab Act
- ▶ **Negotiations re: Remedy:** Parties unable to agree on a negotiated remedial plan; submitted proposals to court

Accessible Pedestrian Signals (2)



Amer. Council of the Blind v. New York

2021 WL 6112028 (Dec. 27, 2021)

- ▶ Court issued decision on remedy
 - ▶ **Phase 1:** Over next 10 years, NYC must install accessible pedestrian signals (APS) at 10,000 intersections over the next 10 years
 - ▶ **Phase 2:** Over next 15 years, NYC must equip all signalized intersections with APS in the next 15 years
 - ▶ NYC must prioritize installations where most needed
 - ▶ Appointed an independent monitor to oversee the remedy and report to the Court on its progress

See also ACB v. Chicago, 2022 WL 657074 (N.D. Ill. March 4, 2022)
(granting class certification in case re: accessible pedestrian signals where DOJ intervened in plaintiffs' case).

Accessible Vote by Mail

Powell v. Benson

20-cv-110230 (E.D. Mich. April 25, 2020)

- ▶ State used paper ballot vote-by-mail system
- ▶ Plaintiffs said this prevented them from voting privately and independently
- ▶ Parties entered into **Consent Decree** in which Michigan agreed to:
 - ▶ Acquire accessible vote by mail system
 - ▶ Deliver ballots so that people with print disabilities can mark ballot electronically
 - ▶ Train county and local officials on accessible vote by mail

Accessible Vote by Mail Cases



- ▶ *Drenth v. Boockvar*, 2020 WL 2745729 (M.D. Pa. May 27, 2020) - TRO granted in Pennsylvania
- ▶ *Gary v. Virginia Dep't of Elections* (E.D. Va. July 27, 2020) - Consent Decree reached resulting in accessible mail-in ballot
- ▶ *Hernandez v. NY State Board of Elections* (S.D.N.Y. June 9, 2020) - Agreement reached allowing voters with print disabilities to receive accessible mail-in ballot that can be marked electronically
- ▶ *Frye v. Gardner* (D.N.H. July 7, 2020) - Lawsuit resulted in NH launching an accessible vote by mail voting system for people with print disabilities to request and fill out an absentee ballot privately and independently

Georgia Voting Case



Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp

2021 WL 6495360 (N.D. Ga. Dec. 9, 2021)

- ▶ Organizations alleged that SB 202 imposes burdens on disabled voters' opportunity to vote by mail, including:
 - ▶ ID requirement
 - ▶ Criminal penalties for providing assistance
 - ▶ Limiting location, number, accessibility of drop boxes
- ▶ **ADA claim:** Requirements “screen out or tend to screen out” people with disabilities; no systemic accommodation; denies voters with disabilities full and equal enjoyment of voting process
- ▶ **State:** Disabled voters have multiple options to vote
- ▶ **Court:** Denied motion to dismiss – case moves forward

Georgia Voting Case (2)

- ▶ Title II does not require a disabled person to be “completely prevented from enjoying a service, program or activity.”
- ▶ Enough to show that the services, program and activity are not “readily accessible” by reason of disability
- ▶ Here, the claim is that SB 202 makes it harder for disabled voters to cast their vote
- ▶ Allegation is that the new absentee voting procedures impose burdens that disproportionately harm disabled voters and prevent them from participating fully and equally in the voting process.
- ▶ This is enough to state a claim
- ▶ **Status:** Case continues

DOJ Voting Roundup



Board of Election Commissioners for City of St.

Louis – DOJ investigation found systemic inaccessibility for voters with mobility and vision impairments, including inaccessible polling places, inaccessible curbside voting, and a failure to provide auxiliary aids and services. Under settlement agreement, Board will begin to address issues before next election; employ temporary measures during elections; train poll workers; survey polling places; and revise policies to select accessible polling places for future elections.

See also www.ada.gov/ada_voting/ballot_box_access.pdf

Sidewalk Accommodations

Munoz v. County of Los Angeles

2021 WL 4316959 (C.D. Cal. Sept. 7, 2021)

- ▶ Wheelchair user sued county for failing to remove vehicles that obstructed sidewalk, driveways, and ramps near his residence.
- ▶ **County:** ADA does not apply to vehicles left by third parties that the County doesn't control
- ▶ **Court:** Maintaining public sidewalks falls within the scope of Title II
 - ▶ Fact that obstructions came from third parties does not mean that Title II does not apply
 - ▶ “This is precisely the sort of subtle discrimination stemming from thoughtlessness and indifference that the ADA aims to abolish.”

Service Animals: Certification

C.L. v. Del Amo Hospital

992 F.3d 901 (9th Cir. 2021)

- ▶ Plaintiff with several mental health conditions self-trained a dog to perform specific tasks for her
- ▶ Psychiatric hospital refused to allow the plaintiff to bring her service animal for inpatient treatment
- ▶ **District court:** Bench trial – found for Hospital
 - ▶ Not a service animal because it was not certified
- ▶ **Court:** Vacated and remanded – found for plaintiff
 - ▶ ADA prohibits certification requirements for qualifying service animals – no formal training requirement
 - ▶ Certification requirement would hinder ADA goals, especially for people with mental health disabilities



Service Animals: Fundamental Alteration



C.L. v. Del Amo Hosp.

2021 WL 4026761 (C.D. Cal. Sept. 3, 2021)

- ▶ Case returned to the trial court.
- ▶ **Trial Court:** It would be a **fundamental alteration** for the service animal to accompany C.L. during treatment
 - ▶ Deferred to the hospital's view that C.L. would likely rely on the dog rather than developing other grounding techniques, such as developing an internal dialogue to deal with her symptoms.
- ▶ **Status:** Appeal to 9th Circuit pending

Effective Communication



Kennedy v. National Career Fairs

18-cv-04655 (N.D. Ga. Nov. 30, 2021)

- ▶ ASL is plaintiff's primary language though she can read and write English
- ▶ Request for an ASL interpreter at NCF job fair was denied
- ▶ **Bench trial:** NCF violated the ADA by denying the plaintiff's interpreter request
 - ▶ An ASL interpreter was the only accommodation that allowed her to communicate effectively at the job fair
 - ▶ English proficiency is "not dispositive" in the effective communication inquiry - context matters
 - ▶ Contemporaneous conversation was necessary to communicate important information

Effective Communication in Healthcare Setting



HHS/DOJ Agreement with Baystate Medical Center

DOJ: Center violated ADA by failing to provide interpreter for two people when at hospital for birth of child

Settlement (highlights):

- ▶ Furnish appropriate auxiliary aids and services to ensure effective communication free of charge to people with disabilities and their companions
- ▶ Adopt criteria for Video Remote Interpreting (VRI)
- ▶ Agreed to not rely on companions for interpreting except in very limited circumstances
- ▶ Staff training on providing auxiliary aids and services

Crisis Standards of Care



- ▶ **Alabama's** emergency plan directed hospitals not to “offer mechanical ventilator support for patients” with intellectual disabilities, “moderate to severe dementia,” and “severe traumatic brain injury.”
 - ▶ Complaint filed with HHS/OCR
 - ▶ Direction removed and Alabama produced a substantially revised crisis standard of care in August 2020
 - ▶ [HHS/OCR Press Release](#)
- ▶ **Tennessee** crisis standards of care disqualified individuals with certain disabilities from use of a ventilator in times of scarcity
 - ▶ [Resolution of HHS/OCR complaint](#)

Mental Health on Campus



Brown University Settlement (Aug 2021)

- ▶ **DOJ:** Brown violated ADA by denying readmission to students who took leave for mental health reasons
- ▶ **Settlement (highlights):**
 - ▶ Revise medical leave of absence and readmission policies, including individualized assessments whether to grant returns based on best available objective medical evidence.
 - ▶ ADA training for faculty/staff responsible for making decisions about requests to take or to return from leaves of absence;
 - ▶ Pay \$684,000 to compensate students who were harmed.

Distance Learning Accessibility

E.E. v. California

2021 WL 5139660 (N.D. Cal. Nov. 4, 2021)

2022 WL 597035 (N.D. Cal. Feb. 28, 2022)

- ▶ Class action under ADA and Rehab Act challenged state law requiring distance learning to be on a specific platform inaccessible to students with disabilities
- ▶ **Court (2021):** Granted TRO – met all elements
 - ▶ Plaintiffs demonstrated likelihood of success on arguments that state law was systemic barrier for students with disabilities for whom in-person schooling posed a health risk
 - ▶ Plaintiffs would suffer irreparable harm without TRO
 - ▶ Balance of equities supported issuing TRO
- ▶ **Court (2022):** Granted preliminary injunction



DOJ Settlement Roundup

Volusia County School District – DOJ

investigation found district punished students for disability-related behavior and denied them equal access through unnecessary removals from classroom. VCS agreed to revise and implement policies on removals, discipline, law enforcement involvement, and behavioral interventions, provide staff training on ADA, retain outside behavioral supports consultant, and establish an ADA complaint procedure and tracking system.

Olmstead & Education



U.S. v. Georgia, 461 F.Supp.3d 1315 (N.D. Ga. 2020)

GA Adv. Office v. GA, 447 F.Supp.3d 1311 (N.D. Ga. 2020)

- ▶ **Lawsuits allege:** Georgia segregates its students with disabilities, most of whom are students of color
 - ▶ Separate schools or inside regular schools but housed in locked wings; facilities in disrepair
 - ▶ Inferior education: some receive computer-based instruction; lack of electives, facilities and activities
- ▶ **Court:** Denied State's motions to dismiss and motions for judgment on the pleadings
 - ▶ Finding state administers the GNETS program
 - ▶ Exhaustion under IDEA not required
 - ▶ DOJ had authority to sue under Title II

Olmstead & Foster Care Placements

G.K. v. Sununu

2021 WL 4122517 (D.N.H. Sep. 9, 2021)

- ▶ **Allegations:** State is violating ADA, Rehab Act by placing foster kids in congregate care facilities (not integrated)
- ▶ **Court:** Motion to dismiss denied
 - ▶ *Olmstead* applies to foster care placements; noted Supreme Court’s findings that confinement in institutions inherently diminishes the lives of people with disabilities, and cited DOJ’s regulations and guidance with respect to the “integration mandate.”
 - ▶ Rejected State’s argument that there is no ADA violation because settings have non-disabled children as well.

Access to Community Housing



Gilead Community Svcs v. Town of Cromwell

No. 3:17-cv-627 (D. Conn. Oct. 15, 2021)

- ▶ **Allegations:** Cromwell unlawfully forced Gilead to close a home for people with mental illness, resulting in institutionalization of the proposed residents.
- ▶ **Court:** Denied defendants' [motion for summary judgment](#) - substantial evidence supporting violations of federal law and that defendants interfered with Gilead's right to operate the home, retaliated against Gilead for asserting its fair housing rights, and stated the Town's preference that people with mental illness not live in Cromwell.
- ▶ **Jury:** [Verdict](#) finding ADA and FHA violation and awarding plaintiff nearly \$5.2 million in damages

Law Enforcement

Estate of Silva v. City of San Diego

2020 WL 6946011 (S.D. Cal. Nov. 25, 2020)

- Family called police and requested Psychiatric Emergency Response Team (PERT) to help son
- Officers did not bring PERT team; gave field sobriety test and arrested Silva for being under the influence of meth
- Found no drugs in system, but not taken for mental health treatment; held for 36 hours; placed pressure on his body and head thinking he was suffering from drug withdraw and delirium
- ▶ Died from lack of oxygen to brain resulting in cardiopulmonary arrest—manner of death homicide

Court: Denied City and County motion to dismiss

- Officers wrongfully arrested Mr. Silva because they misperceived the effects of symptoms of his schizophrenia as the effects of methamphetamine use, although they were on notice of his disability

Larkin v. Kenison

475 F. Supp 3d 1124 (D. Haw. 2020)

- ▶ Police arrested man with autism and mental illness
- ▶ **Court:** No wrongful arrest as he was not incorrectly perceived to be engaged in criminal activity,
- ▶ Possible “failure to accommodate” claim as officers could have engaged in a calmer, less threatening approach

DOJ Settlements re: Corrections



Whatcom County (June 2021)

- ▶ No ASL interpreter for police questioning, discussion with public defender, or superior court
- ▶ **Settlement (highlights)**
 - ▶ Developing policies, monitoring and logging interactions, contracting with sign language interpreters, hiring ADA coordinator, training and logging interactions where interpreter is needed, ensure availability of interpreter at all times
 - ▶ Handcuff in front of body unless safety risk in doing so- if they perceive risk must log

www.justice.gov/usao-wdwa/pr/doj-and-whatcom-county-resolve-multiple-complaints-regarding-violations-americans

ODU Treatment in Corrections



P.G. v. Jefferson County

2021 WL 4059409 (N.D.N.Y. Sep. 7, 2021)

- ▶ Plaintiff sought injunction under ADA to force jail staff to provide methadone treatments while incarcerated
- ▶ **Court:** Preliminary injunction granted – plaintiff showed he will suffer irreparable, life-threatening harm if cut off from methadone treatment during litigation – methadone treatments must be provided
 - ▶ Opioid use disorder is an ADA disability and P.G. is participating in supervised rehab program
 - ▶ Doc prescribed methadone as medically necessary
 - ▶ Jail’s offer to administer other medication would not be “effective” as shown by past attempts

DOJ Settlements re: Corrections (2)

Vermont Dept of Corrections

www.ada.gov/vdoc_sa.pdf

- ▶ Physical access and effective communication
- ▶ Settlement (highlights)
 - ▶ Structural changes to prison facilities,
 - ▶ Implement hearing screening assessments
 - ▶ Develop individualized communication plans
 - ▶ Train staff
 - ▶ \$80,000 in damages to aggrieved individuals

See also DOJ Settlement with San Luis Obispo County Jail: www.ada.gov/san_luis_obispo_sa.html (June 2021)



DOJ Settlements re: Corrections (3)

State of Nevada

www.ada.gov/nv_doc_sa.html (Feb. 2021)

- ▶ **DOJ:** Discriminated through isolation and segregation
- ▶ **Settlement (highlights):**
 - ▶ Amended policies, practices and procedures to ensure that people with HIV are not isolated or segregated solely due to their HIV status and will keep information confidential
 - ▶ No exclusion from employment opportunities and lower-level classifications, housing placements, services and activities
 - ▶ Training for NDOC staff and individuals on HIV
 - ▶ Statewide and facility-specific ADA coordinators

DOJ: Web Accessibility Roundup

DOJ Settlement with Hy-Vee

www.ada.gov/hy-vee_sa.pdf (Nov 2021)

- ▶ Vaccine Registration Portal had some access barriers
- ▶ Settlement Agreement (highlights):
 - ▶ Resolve issues that prevent private and independent access of the substantive information about the COVID-19 vaccine, scheduling vaccine appointment, or completing vaccine-related forms
 - ▶ Within 90 days, conform to **WCAG 2.1 AA** for certain parts of site (ex: Vaccine Registration Portal)
 - ▶ Contact info for feedback; phone access; automated website accessibility testing; web access consultant; user testing; training

See also [DOJ Guidance on website accessibility under Title II](#)



Questions?

