Marquette Elder's Advisor

Volume 3
Issue 1 *Summer*

Article 15

A Quick Survey of the Americans with Disabilities Act

A Quick Survey of the Americans with Disabilities Act for Elder Law Attorneys

The Americans with Disabilities Act provides a wide range of protections from discrimination for elders who have physical and mental disabilities. The following article, the first of a series, provides an overview of the structure and principles of the ADA, concentrating on the protections provided for senior citizens seeking to remain on the job. It also provides guidance for attorneys with claims for discrimination by commercial facilities and government activities and programs.

The Americans with Disabilities Act (ADA) is a powerful legal tool to prevent discrimination against people with disabilities, including those who are elders. The ADA builds on the anti-discrimination laws that preceded it[1] and may offer help in many circumstances, including employment, state government facilities and programs, and access and use of public places and businesses. Case law developed under the Rehabilitation Act of 1974, in suits alleging discrimination by federal entities and contractors, is considered valid precedent for analogous cases brought under the ADA.[2]

Overview of the Law and Regulations

The ADA is divided into three substantive parts, following a brief statement of findings and purposes, and only three definitions[3] that apply throughout the act.[4] Title I addresses anti-discrimination requirements in employment settings.[5] Title II[6] sets out the requirements and reasons for complaints regarding public entities, including state and local laws, programs, and facilities.[7] The statute includes detailed guidance about public transport—busses on fixed routes or on demand, rail travel—as peculiarly governmental activities.[8] The regulations provide some more detailed standards regarding curbs and streets, signage, and telecommunication systems requirements.[9] Perhaps most important, the regulations provide direction regarding the complaint and response, including the provision that states shall not be immune from suit under the Eleventh Amendment of the Constitution.[10]

Title III of the ADA prohibits discrimination by public accom-

modations, including any commercial facilities such as restaurants, theaters and hotels, mass transport,[11] and "all or any portion of buildings structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure or equipment is located."[12] The most debated and significant regulations regarding public accommodations set out the requirements for physical facilities that are subject to some renovation.[13]

Each title, in the manner of federal statutes, sets out definitions of terms, the nature of discriminatory activities, and enforcement measures. Regulations are quite important to the interpretation of the laws, though courts have not always agreed with all their provisions. The regulations for Title I, under the enforcement powers of the Equal Employment Opportunity Commission (EEOC) appear in 29 C.F.R. Part 1630. The regulations for Titles II and III appear in 28 C.F.R. Parts 35 and 36 respectively.

Each title has additional guidance provided by the agency responsible for its interpretation. The most convenient way to access this information is at the agency website or its links to academic or advocates' sites. Title I is the subject of EEOC Interpretive Guidance, which expounds the agency's analysis, section by section, of the regulation. A technical assistance manual adds further discussion and examples supporting the agency interpretation. A still longer treatment of the material is found in the Interim Enforcement Guidance. Similarly, the Department of Justice (DOJ) provides Interpretive Guidance and Technical Assistance on Titles II and III.

Defining Disability Discrimination

The fundamental definition of discrimination is similar in each of the titles of the law, but with some adjustments to language to provide guidance to covered entities. For example, Title I states that discrimination is prohibited in job application procedures, hiring, advancement, or discharge; compensation; job training; and other terms, conditions, and privileges of employment. The law continues with more specific construction of the nature of discrimination:

- Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects his or her opportunities or status because of disability
- Participating in a contractual or other arrangement that has such an effect on an employer's qualified applicant or employee, including employment referral agencies, labor unions, insurers and plans providing employee fringe benefits, and training programs
- Utilizing administration standards or methods that discriminate on the basis of disability or allow others to do so
- Denying equal job or benefits to a person because they are known to have a relationship with a person with a disability (such as denying employment that would bring the right of health insurance to an employee with a person with a disability in the family)
- Failing to make reasonable accommodations for known physical or mental limitations (unless accommodation poses an undue burden, as discussed below)
- Using qualification standards or employment tests that tend to screen out persons with disabilities, (unless the tests or criteria are job-related and consistent with business necessity, as discussed below)
- Failing to administer tests and screens in ways that minimize discriminatory effects[14]

The regulations provide further specifications.[15]

The Title II definition of discrimination is more succinct: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.[16]

Title III specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[17] As with Title I, a statement of construction

prohibits the following specific activities, either directly or through contractual, licensing, or other arrangements:

- Denial of participation[18]
- Participation of unequal benefit[19]
- Separate benefit, unless necessary to provide the person with a disability with equally effective services, goods, privileges, etc.[20]

The person with a disability must receive the benefit of goods, services, facilities, privileges, advantages, or accommodations.[21] The regulations add that public accommodations shall afford goods, services, facilities, privileges, and advantages to an individual with a disability in the most integrated setting appropriate to the needs of that individual.[22]

Who Is Prohibited from Discrimination?

In generally prohibiting discrimination, the ADA provides some strategic exceptions, practical and political, from the vigilance and expense of compliance. Under Title I, for example, employers (who are "covered entities") include those with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.[23] Federal government, which is covered by the Rehabilitation Act of 1974, is exempt from ADA requirements, as are sovereign Indian tribes and private membership clubs.[24] U.S. employers doing business outside the United States generally are subject to ADA requirements, unless actions required under the Act constitute a violation of the law of the country in which the workplace is located.[25]

Employment Discrimination

The nature of inquiries or examinations an employer might make regarding the existence of disabilities depends upon the stage of the hiring and employment process. There are three stages, each with its specifications: preemployment, post offer, and employee examinations.

1. *Preemployment exams and testing.* Prior to making a job offer to an applicant, prospective employers are prohibited from conducting medical examinations or making inquiries of an applicant as to whether that applicant is a person with a disability or the nature or severity of any possible disability. Inquiries must relate to the applicant's ability to perform job-related functions,[26] and the form of the questions must focus on the applicant's capabilities. The EEOC specifies in its guidance that even if an individual has an obvious impairment, such as the lack of an arm or leg, the employer may only inquire, or ask the applicant to demonstrate, how he or she would perform specific job duties. The duties include any within the scope of the job, and are not restricted to the "essential functions" that are scrutinized if an individual becomes disabled on the job and seeks accommodation to continue to hold a position. If, for example, the applicant sought a job as a stock handler, the employer could say: "The job includes transporting cartons that weigh up to 65 pounds and shelving them on platforms up to 6 feet high." Asked to demonstrate the completion of such a task, the applicant can request accommodation such as an implement to extend the reach or strength of a missing limb, or to facilitate balance, and the employer must provide the accommodation for the test in order to allow the applicant to demonstrate capability.[27] The accommodation must be "reasonable" (discussed below in "Undue Burden") and the employer cannot refuse to hire an individual with a disability because of his or her need for such an accommodation.

   An employer is free to administer tests of technical skills required for the jobs applicants seek.[28] However, such tests must be given in conditions that allow the test to reflect skills and aptitudes, not an applicant's impairments. In addition, using tests or selection criteria that tends to screen out people with disabilities is prohibited.[29]
2. *Post offer (also called entrance examination).*

After an offer has been made, the employer may require a medical examination to be conducted prior to beginning employment duties.[30] Hiring may be conditioned upon the results of the examination, which must be required of all entering employees for like positions. The scope of the entrance examination need not be restricted to matters central to the job, that is, "job-related and consistent with business necessity," as required for employees' exams.

Once a medical record is made, information regarding medical condition or history must be maintained separately from the employee's file and treated as confidential; and the results of the examination are not to be used as a basis for illegal discrimination.[31] Information can be made available to supervisors in order to implement accommodations, and to health and emergency personnel in order to facilitate services if such response is needed.[32]

3. *Employee medical examinations.* Once hiring has taken place, an employer may not require a medical examination or make inquiries about an employee's possible disability, or the nature and severity of a disability, unless the purpose is "job-related and consistent with business necessity."[33] The constraints noted above do not apply to testing for illegal drugs, which are not considered to be medical examinations or inquiries under the ADA.

Title II Discrimination: State and Local Government

Under Title II, a public entity includes state or local governments and any department, agency, etc. that is an instrumentality of the state or local government.[34]

By 1993, all public entities were required to conduct a self-evaluation of services, policies, and practices to assure compliance with the act, providing an opportunity for public input.[35] The entity must establish a plan for compliance, with dates on which specific goals will be met.[36] While this seems like a substantial number of years ago, cases still may appear that assert that the city or county either did not conscientiously conduct the assessment, or that the plan was not drafted or implemented.

Government facilities, including administrative buildings, agencies, and courthouses, must operate so that every service, program, or activity, when viewed in its entirety, is readily accessible to persons with disabilities.[37] However, compliance may be accomplished by means other than construction or remodeling.[38] If a structure listed on the National Register of Historic Places is involved, alternative methods of access need only be accomplished if adaptation to provide physical access threatens or destroys the historic significance of the property.[39]

New construction after 1992 must be readily accessible. With regard to specific government operations, new streets and curbs must include curb cuts to allow access.[40] Also, when a government operates a fixed-route transit system, it must assure that transport is available to persons with disabilities, including those using wheelchairs.[41] In many instances, government will choose to run a minibus system with the busses adapted with lifts, or subsidize taxi vouchers for those who can use them, rather than incur the expense of purchasing full-size "kneeling" busses.

Title III Discrimination: Public Accommodations

Title III public accommodations include a broad sweep of entities of different types and purposes, including such places as follows:

- Inns, hotels, or other places of lodging, excepting those having five or fewer rooms for rent and actually occupied by the proprietor
- Restaurants, bars, or other places selling food and drink
- Movie and stage theaters, concert halls, and stadiums
- Auditoriums, convention centers, and lecture halls
- Bakeries, grocery stores, clothing and hardware stores, and shopping centers
- Laundromats, dry cleaners, banks, barber and beauty shops, travel services, shoe repair services, funeral parlors, gas stations
- Professional offices, including lawyers, accountants, and doctors
- Pharmacies and hospitals

- Public transport buildings, including terminals, depots, and stations
- Museums, libraries, galleries, and other public displays
- Parks, zoos, amusement parks, and other recreation places
- Schools, including nurseries, elementary, secondary, etc.
- Day care centers, senior centers, homeless shelters, food banks, adoption agencies, and other social services facilities
- Gymnasiums, spas, bowling alleys, golf courses, and other places of exercise and recreation[42]

Individuals are prohibited from engaging in discrimination by the Act if they own, lease (or lease to), or operate a place of public accommodation. Neither can one use criteria that tend to screen out a person with a disability, unless the screening is necessary. Safety requirements are permitted, but must be based on actual risks, not mere speculation, stereotype, or generalization about people with disabilities.[43] No surcharge can be assessed against people with disabilities to pay the cost of accessibility measures.[44]

Clearly, offices open to the public must be accessible. When a place of public accommodation is located in a private residence, the part that is open to the public, including paths outside and restrooms, must be accessible.[45] An interesting question is whether intangible "places" must also be accessible. Title III regulations state that insurance underwriting and risk classification is not prohibited.[46] However, the fact that public accommodations "shall not refuse to serve an individual with a disability because its insurance company conditions coverage or rates on the absence of individuals with disabilities"[47] suggests that cost should not cause *de facto* exclusion. Other intangible "places" to which people with disabilities have sought access under the ADA include television coverage of special events that are "blacked out" locally to encourage attendance. Plaintiffs with hearing impairments (unsuccessfully) sought relief because radio broadcast did not allow them contemporaneous access to the game, while those with other impairments did have access.[48]

Who Is Protected?

The Titles of the ADA provides protection to an "individual with a disability"defined as one who has a physical or mental impairment that substantially limits one or more of the major life activities of such individual or has a record of such impairment or of being regarded as having such an impairment.[49] A physical or mental impairment includes physiological disorders, cosmetic disfigurement, or anatomical loss affecting one of the major body systems.[50] Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[51]

Generally, the covered entity (employer, public entity, or privately owned accommodation for the public) must make adjustments or modifications that are "reasonable" in nature and cost in order to allow full participation by a person with a disability. A person who can participate or work, with or without such accommodations or adjustments, is termed a "qualified person with a disability." Thus, the scope of the ADA's coverage depends upon one being a "qualified person with a disability," that is, substantially impaired in a major life function, but not so impaired as to be precluded from an activity if reasonable accommodations are made.

Title I Protections

Under Title I the individual must be "qualified," that is, able to perform the essential functions of the job held or sought. The question of what is essential takes into account any written job description and gives deference to the employer's view of essential tasks. However, the employer and employee are to engage in a dialogue to determine whether there is any "reasonable accommodation" necessary to enable the individual to perform job functions.[52] Essential functions, under the Title I regulations, are those functions the position was created to perform, or that a limited number of employees are available to perform, or that are highly specialized so the worker is hired for his or her particular expertise or ability.[53] Substantial limitation in a function means the person is unable to perform a major life activity the average person in the general population can perform or is significantly restricted as to the condition, manner, or duration in which the person can perform the activity.[54] With respect to working, a person is significantly restricted in the ability to perform

either a class of jobs, or a broad range of jobs in various classes, compared to the average person with comparable training, skills, and abilities.[55] Reasonable accommodation may include adjustments to the job application process to enable a person to be considered (as described above), modifications to the work environment or the circumstances under which the work is usually performed, or adjustments that enable a person to enjoy equal benefits and privileges of employment.[56]

"Person with a disability" is the most debated term in the ADA's history. In 1999, the U.S. Supreme Court decided three cases[57] that will have a profound impact on the course of ADA litigation. Each of the plaintiffs has chronic disabilities that are significantly corrected by drugs or assistive devices. The Suttons, twin sisters and qualified pilots, have eyesight that is correctable to 20/20; truck driver Kirkingberg has "monocular vision" because one eye has extreme nearsightedness that makes it unusable in driving; and mechanic Murphy has a severe case of high blood pressure that is lowered by the use of medication.

The Court reviewed the ADA claims of the plaintiffs and took particular interest in the threshold question of whether they qualified as claimants to protection under the ADA. Establishing that the plaintiff is a person with a disability has been established as essential to most cases, and a negative decision acts to cut off further inquiry, specifically whether the employer excluded the individual based upon disability. That is to say, the employer is free to exclude an applicant for many reasons, including matters of physical capability, provided the decision does not offend an anti-discrimination statute such as the ADA. For example, an employer is free to prefer a taller applicant because there is no discrimination in excluding one of moderate or shorter height. Similarly, an employer generally is free to prefer a slimmer applicant. However, if the obesity of the competitor in the hiring pool is a disability under the ADA, a number of requirements must be met before that overweight applicant can be excluded. Specifically, the employer must not set up entrance tests that tend to exclude persons with this disability; the employer must not conclude that the obese person is medically disabled without a specific reason (and demonstration) that obesity impairs the applicant's ability to perform the duties of the job; and any medical examination cannot draw conclusion. Rather, it must show on an individualized basis that the individual cannot perform on the job, poses an immediate threat to others,[58] or the accommodations needed to enable the individual to perform the essential functions of the job pose an undue burden to the employer.

Title II Protections

Under Title II, a "qualified individual with a disability" must meet the essential eligibility requirements for the receipt of services or participation in a publicly run program, with or without reasonable modifications to rules, policies or practice, removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services. Auxiliary aids include a wide variety of assistance from mechanical and electronic devices to skilled persons.[59]

Title III Protections

Under Title III, a "qualified person with a disability" is one who can participate safely with or without reasonable modifications to the goods or services provided.[60] A modification is not reasonable if it would fundamentally change the nature of the good or services.[61] In terms of access to facilities, public accommodations must make modifications that are readily achievable. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense, taking into account the nature and cost of the action, the overall financial resources of the site, or of the parent company or entity, if appropriate.[62] The regulations provide a priority list for barrier removal, beginning with building access through sidewalks and doorway ramps, parking, and public transportation. The second priority is access to the areas where goods and services are offered. Third is access to rest rooms. If removal of barriers is not readily achievable, certain alternative means are acceptable, including curb service and home deliveries, providing assistance to retrieve goods from inaccessible shelves and relocating activities.[63] An example of an acceptable alternative is offered in terms of multiscreen cinemas. If all theaters cannot be made accessible, it is acceptable to rotate the films so a person with a disability has access to each film shown on some specified days.

Specific Exceptions to Coverage

Recurring exceptions throughout the ADA target persons with disabilities who use illegal drugs or are under the influence of alcohol.[64] All covered entities can establish rules regarding smoking, including prohibiting smoking within their areas. Certain behaviors clearly are given limited or no protection under the ADA. The most complete provision includes transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.[65]

Under Title I, for example, an applicant or employee who is engaged in illegal use of drugs is not a "person with a disability" under the Act and, therefore, can bring no claims under its provisions.[66] However, an employer may not discriminate against one who has successfully completed a supervised drug rehabilitation program (or has otherwise been successfully rehabilitated) and is no longer using illegal drugs.[67] Employers may also prohibit the use of alcohol at the workplace and prohibit employees from being under the influence of illegal drugs or alcohol at work. Any unsatisfactory performance that is related to illegal drugs or alcohol need not be accommodated.[68]

Similarly, Titles II and III specify that the illegal use of drugs renders the individual unprotected by the Act[69] and include other exceptions similar to Title I.[70]

Defenses to Claims of Discrimination

In addition to the limitation of reasonable accommodation or modifications, covered entities have two specific reasons for engaging in discriminatory behavior as defined by the ADA.

Accommodation Is an Undue Burden

First, the entity can assert that having the person with a disability participate is an undue hardship or burden. Specifically, under Title I, an undue hardship means significant difficulty or expense for the employer in providing an accommodation.[71] In the abstract, the burden is a matter of the funds needed to adapt the work facility. In practice, most burdens borne by the employer are an accretion of on-the-job interactions, schedule and duty readjustments, and employee difficulties with a coworker with a disability that affects the work of others.

The inverse of the factors defining reasonable accommodation, factors to be considered in defining an undue burden, include the following:

- The nature and net cost of the accommodation
- The overall financial resources of the facility or facilities involved
- The overall financial resources of the covered entity
- The type of operations of the covered entity, number of employees, and type and location of facilities
- The impact of the accommodation upon the operation of the facility, including the impact on other employees and on the facility's ability to do business[72]

Similarly, under Title III, the elements of undue burden mean significant difficulty or expense. However, the list of factors is tailored to the likely concerns of the public accommodation.[73]

In recognizing an undue burden, an employer's or supervisor's considerations cannot include any stereotypical or nonobjective responses that others may feel about working with a person with a disability. The frequent, hard case that involves this standard is assigning light duty or preferred circumstances to accommodate a person with a disability. If others are permanently excluded from a benefit that is in short supply (such as a preferred posting to a desirable foreign city), such an accommodation might be reasonable if temporary, but would be an undue burden if expected to be permanent.[74] In a very common scenario, the accommodations provided an employee who has a nonobvious disability (for example, a psychiatric disability) might cause concern or resentment by coworkers who perceive the individual is receiving unduly favorable treatment. Yet, the employer is not free to disclose any information about the disabled employee's disability.

Direct Threat

A covered entity can assert that the individual poses a direct threat, which is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. This language is generally

considered to mean a threat to safety to the person with a disability as well as others, and Title I specifies "the individual or others." It continues to specify that "the determination an individual poses a direct threat shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[75] Further, the assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. Factors to be considered include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.[76]

Enforcement Provisions

Titles I, II, and III of the ADA provide slightly different roads for claimants. Those pursuing claims against employers (Title I) and public accommodations (Title III) must exhaust their administrative remedies with the EEOC and the Department of Justice (DOJ) respectively. Once provided a letter giving permission to sue, however, they can proceed to the federal district courts. Claimants for discrimination by state and local government (Title II) need not pursue administrative remedies but can proceed directly to court. ADA claims may also be pursued directly by the EEOC (Title I) or DOJ (Titles II or III). Title III provides that an individual need not engage in a futile gesture if he or she has actual notice that a person or organization does not intend to comply with ADA provisions.[77] A claimant can seek damages for violation of the act, which may be as much as $300,000 for Title I violations, or can seek injunction to compel conduct in accord with the statute.

Endnotes

1. The ADA derives from the landmark Civil Rights Act of 1964 (42 U.S.C. § 2000e). The predecessor act prohibiting disability discrimination is the Rehabilitation Act of 1973 (29 U.S.C. §§ 701–718), with regulations at 34 C.F.R. Pt. 104. The Rehabilitation Act prohibits discrimination by federal agencies and employers, federal contractors, and recipients of federal funds. Other related legislation addresses voting discrimination, discrimination in primary education, housing discrimination, and employment leave policies related to disability of the employee or a family member.

2. Congress, in passing the ADA, incorporated the purposes, applicable regulation and established case decisions of the Rehabilitation Act of 1973.

3. The terms are, in alphabetical order, "auxiliary aids and services," "disability," and "state." The most frequently used term, "disability," is "with respect to an 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." *See infra* notes 49 through 63 and accompanying text (Who Is Protected.)

4. 42 U.S.C. §§ 12101–12102. There are two additional sections: Title IV briefly addresses telecommunications requirements, and Title V, Miscellaneous Provisions, restates exclusions found in each title regarding transvestites and illegal drug use, and prohibitions on retaliation and coercion, among other matters. Section 12205 of Title V specifies that an agency or court may allow the prevailing party a reasonable attorney's fee, including litigation expenses and costs.

5. 42 U.S.C. §§ 12111–12117. Regulations by the Equal Employment Opportunity Commission (EEOC) on Title I are found at 29 C.F.R. Pt. 1630.

6. Title II is the section of the ADA that is at issue in cases pending before the Supreme Court in the 2000–01 term. The appellants assert that federal law cannot expose the states to such liability for discrimination, because it is prohibited by the Eleventh Amendment of the Constitution. *See* Univ. of Ala. v. Garrett, 120 S. Ct. 1669 (2000).

7. 42 U.S.C. §§ 12131–12134. Regulations by the DOJ are found at 28 C.F.R. §§ 35.101 *et seq.*

8. 42 U.S.C. §§ 12141–12165.

9. 28 C.F.R. §§ 35.151, 35.161–35.163.

10. 28 U.S.C. § 35.178 (regarding state immunity). *See supra* note 5 and accompanying text.

11. Air travel is covered by the Rehabilitation Act of 1973 at 29 U.S.C. § 794.

12. 28 C.F.R. § 36.104.

13. 42 U.S.C. § 12183; 28 C.F.R. §§ 36.304–36.310 (including removing barriers to testing). *See also* 28 C.F.R. §§ 36.401–36.406 regarding requirements for new construction.

14. 42 U.S.C. §§ 12112 (a), (b).

15. 29 C.F.R. § 1630.4. Note that the courts have not always agreed with the EEOC's interpretation of the statute.

16. 42 U.S.C. § 12132; 28 C.F.R. § 35.130.

17. 42 U.S.C. § 12182(a).

18. 42 U.S.C. § 12182(b)(1)(A)(i).

19. *Id.* at § 12182(b)(1)(A)(ii).

20. *Id.* at § 12182(b)(1)(A)(iii).

21. The regulations largely restate the statute. *See* 28 C.F.R. § 36.202.

22. *Id.* at § 36.203.

23. For two years following implementation of the ADA, employers could have up to 24 employees under the same calendar formula, a concession to the small business potentially most burdened by the Act. *See* 42 U.S.C. § 12111(5)(A).

24. 29 C.F.R. § 1630.2(e).

25. 42 U.S.C. § 12112(c). Requirements vary somewhat depending upon control of foreign corporations, and no requirements are imposed on foreign corporations under foreign control. *Id.* This does not exempt foreign corporations doing business in the United States.

26. *Id.* at § 12112(d).

27. *See* EEOC TECHNICAL ASSISTANCE MAN. ON THE ENFORCEMENT PROVISIONS (TIT. I) OF ADA §§ 1–5.5 (1992).

28. *See* 29 C.F.R. §§ 1630.10–1630.11.

29. *Id.*

30. 42 U.S.C. § 12112(d).

31. A test for the use of illegal drugs by an employee is not considered to be a medical examination under 42 U.S.C. § 12112(d). *See id.* at § 12114(d).

32. *See id.* at § 12112(d)(3)(B).

33. *Id.* at §12112(d)(4)(A).

34. *Id.* at § 12131(1). Railroad Corporations and Authorities also are included. *Id.*

35. 28 C.F.R. § 35.105.

36. *Id.* at § 35.150(d) (transition plans).

37. *Id.* at § 35.150(a).

38. *Id.* at § 35.150(b)(1).

39. *Id.* at §§ 35.150(a)(2), (b)(2).

40. *Id.* at §§ 35.150(d), 35.151(e).

41. *Id.* at § 12143 (a).

42. 28 C.F.R. § 36.104.

43. *Id.* at § 36.301(b).

44. *Id.* at § 36.301(c).

45. *Id.* at § 36.207.

46. *Id.* at § 36.212(a).

47. *Id.* at § 36.212(c).

48. *See generally* Stoutenborough v. N.F.L., Inc., 59 F. 3d 580 (6th Cir. 1995).

49. 42 U.S.C. § 12102(2).

50. *E.g.*, 29 C.F.R. § 1630.2(h) (body systems include neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities).

51. *E.g.*, *id.* at § 1630.2(i).

52. 29 C.F.R. §§ 1630.2(n)–(o).

53. *Id.* at § 1630.2(n).

54. *Id.* at § 1630.2(j)(1).

55. *Id.* at § 1630.2(j)(3)(i).

56. *Id.* at § 1630.2(o).

57. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999).

58. The statute at 42 U.S.C. § 12113 excludes only individuals who are a direct threat to others on the job. The EEOC in its regulations (29 C.F.R. § 1630.15) expanded the description to "self and others," and the interpretation went unchallenged for a decade. Recent cases have challenged the paternalism of excluding a person with a disability from filling a position that might endanger his or her

health (but poses no threat to others on the job). *See* Echazabal v. Chevron U.S.A., Inc., 226 F. 3d 1063 (9th Cir. 2000) (divided three-judge panel rules that plaintiff, Mario Echazabal, who had worked at the refinery for various maintenance contractors for more than 20 years, cannot be excluded on the basis of disability when he applies to work for the refinery itself, on the basis of disability possibly created by exposure to solvents in the refinery).

59. 28 C.F.R. § 35.104 (some of the most widely used include interpreters, notetakers . . . telephone handset amplifiers . . . telecommunications devices for deaf persons (TTDs), videotext displays . . . qualified readers, audio recordings, Braille materials, etc.).

60. *Id.* at § 36.302(a).

61. *Id.*

62. *Id.* at § 36.104(definition of "readily achievable").

63. *Id.* at § 36.305(b).

64. *E.g.*, 42 U.S.C. § 12114.

65. 28 C.F.R. § 35.104 (exceptions to the definition of disability in Title II).

66. 42 U.S.C. § 12114(a).

67. *Id.* at § 12114(c).

68. *Id.*

69. 28 C.F.R. § 36.209.

70. *Id.*; 42 U.S.C. §§ 12112 (a), (b).

71. 29 C.F.R. § 1630.2(p).

72. *Id.* at § 1630.2(p)(2).

73. 28 C.F.R. § 35.104 (defining undue burden).

74. *See generally* Barth v. Gelb, 2 F. 3d 1180 (D.C. Cir. 1993).

75. 29 C.F.R. § 1630.2(r).

76. *Id.*

77. 42 U.S.C. § 12188(a)(1).