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the jurisdiction in which a complaint is filed; access to legal assistance; and the subject matter involved (i.e., employment, housing, education, public accommodation, public services).

Notwithstanding the availability of many different laws to address disability grievances, the ADA was expected to make these laws obsolete, at least in most respects. Its enactment was viewed as an historic step forward for persons with mental, physical, cognitive, and sensory impairments. Despite its high promise, many of the ADA's purposes have not yet been, and will never be, achieved unless the law is amended, or new laws are enacted to provide the protections that the ADA and other disability laws lack.

Courts have reached consensus on many, if not most, of the critical ADA issues, including its coverage (or lack thereof). By and large, the current judicial consensus takes a much more restrictive view of the ADA's scope and coverage than was contemplated by disability advocates who pushed for the law's enactment. Unfortunately, the ADA was enacted with certain compromises that have helped encourage—or at least made it easier for—courts to view the legislation restrictively. As a result, persons with disabilities and their advocates have a substantially weaker piece of legislation than they expected, and no attractive forum to rectify this situation. State courts and legislatures, for the most part, have been unwilling to go further than the federal government. Moreover, many advocates view Congress as being at least as likely to further restrict the ADA than to expand it.

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John Parry

PART 1

An Overview of the History, Basic Elements, and Limits

When Congress was considering the Civil Rights Act of 1964, reportedly, Dr. Jacobus TenBrock, then president of the National Federation of the Blind, advocated that people with disabilities be included, but his arguments were dismissed.[1] Not surprisingly, then, although its historical and theoretical roots are found in our nation's civil rights statutes, disability discrimination law has taken a separate path. This divergence reflects the particular needs and desires of persons with disabilities, as well as the special nature of disability-based discrimination and stigma in our society.

Before examining in detail the six substantive areas of the law that this *Handbook* covers—employment, public services, public accommodations, housing, education, and telecommunications and the internet—several important disability law topics are covered, which provide an introduction to the discussions that follow. These topics include a brief history of the disability rights movement; an overview of the most important federal and state statutes, particularly the Americans with Disabilities Act[2] (ADA); ADA enforcement and sovereign immunity limitations; and attorneys' fees.

1.01 History of Disability Rights Before the ADA: 1960-1989

(a) Introduction

The struggle for disability rights is integral to the civil rights struggle, which seeks to ensure that no person is excluded from fully participating in society based on race, national origin, gender, or disability. Civil rights laws embody the promise of equal opportunity, which is rooted in the Declaration of Independence's assertion that "all men are created equal," and in the Fourteenth Amendment's guarantee of "equal protection of the laws." But equal protection is not merely a legal proposition. It is also a moral proposition.[3]

The modern history of the disability rights movement prior to the enactment of the ADA in 1990 may be conveniently divided into the three decades running from 1960 through 1989. Before then, with only a few exceptions, there was little in terms of an organized, broad-based disability rights effort. The exceptions included the establishment of local organizations to advocate the interests of deaf people in the early 1850s, which led to the creation of the National Association of the Deaf in 1880, and protests in the 1930s by the League of the Physically Handicapped against disability

1. Scott C. LaBarre, "Section 508 and Persons with Visual Impairments," *in Internet and Other Electronic Information Access for Persons with Disabilities* 25 (American Bar Association, Commission on Mental and Physical Disability Law 2002).
2. 42 U.S.C. §12101 *et seq.*
3. Excerpt from speech presented by Bill Lann Lee, then Acting Assistant Attorney General for Civil Rights, at a June 1998 conference, sponsored by the American Bar Association, entitled "In Pursuit . . . A Blueprint for Disability Law and Policy."

discrimination in government programs.[4]

Not until the 1940s, was there anything more than isolated instances of advocacy. During World War II, the National Federation of the Blind and the American Federation of the Physically Handicapped were established.[5] Right after the war, the Paralyzed Veterans of America was founded.[6] Also, in 1948, as the first Civil Rights Act was being enacted, Congress recognized the veterans who had been injured in World War II by passing a bill that barred discrimination based on "physical handicap" in U.S. Civil Service jobs.[7]

During the 1950s "parents of disabled children formed self-help groups that . . . grew into national advocacy organizations."[8] In addition, the Vocational Rehabilitation Act Amendments of 1954[9] were enacted, reflecting the idea put forward by Mary Switzer and others that the rehabilitation of persons with physical or mental disabilities, particularly soldiers who had been injured in the Korean War, should focus on the whole person.[10] As part of this movement, some of the persons who typically had been "warehoused" in large institutions were to receive services in rehabilitation centers.[11]

(b) The 1960s: Rights in Institutions

Much of the initial legal impetus for the modern disability rights movement can be traced to attempts that began in the 1950s to correct longstanding abuses in our mental institutions, which did not gain significant legal recognition until the 1960s. From a purely conceptual viewpoint, the beginning of a legal framework for the disability rights movement can be traced to Morton Birnbaum, a civil rights lawyer and doctor. In a 1960 article published in the *ABA Journal*, Birnbaum presented and argued for a constitutional right to treatment—based on substantive due process—for mental patients who had been deprived of their liberty after being involuntarily committed. Moreover, he asserted that if repeated court decisions constantly reminded the public about inadequate care in these institutions, then public opinion would force legislatures to increase appropriations to provide adequate care and treatment.[12] Six years later, this due process "right to treatment" was recognized, but not mandated, by the D.C. Circuit in *Rouse v. Cameron*.[13]

In the courts, civil rights lawyers began to challenge states that continued to confine mental patients and other institutional residents without proper care and treatment. This litigation led to the groundbreaking and controversial notion that states could not

4. Fred Pelka, *The ABC-CLIO Companion to the Disability Rights Movement* xi (1997).
5. *Id.*
6. *Id.*
7. Act of June 10, 1948, Pub. L. No. 80-617, 62 Stat. 351.
8. Pelka, *supra* note 4, at xi.
9. 29 U.S.C. §§31-42 (repealed 1973).
10. Ruth O'Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* 63-87 (University of Chicago Press, 2001).
11. *Id.* at 85-86.
12. Morton Birnbaum, "The Right to Treatment," 46 *A.B.A. J.* 499, 503 (1960).
13. 373 F.2d 451 (D.C. Cir. 1966).

civilly commit persons involuntarily, unless meaningful treatment was provided, or the persons were dangerous to self or others. Later, the U.S. Supreme Court adopted much of this reasoning in *O'Connor v. Donaldson*,[14] and its progeny, *Zinermon v. Burch*,[15] although without recognizing a constitutional right to treatment *per se*. Instead, the right to treatment became the foundation of the deinstitutionalization movement of the 1970s by making a dangerousness to self or others (or grave disability) finding necessary for any involuntary civil commitment to be constitutional.

A second essential component of deinstitutionalization was the least restrictive alternative. This concept posits that government, when limiting citizens' rights in order to achieve legitimate governmental objectives, must do so in ways that least intrude upon those rights. Judge David Bazelon embraced this principle in the civil commitment context, noting that, "[d]eprivations of liberty solely because of dangers to the [mentally] ill persons themselves should not go beyond what is necessary for their protection."[16] The least restrictive alternative has been incorporated into the larger disability rights movement through the mainstreaming and integration requirements of the Individuals with Disabilities Education Act (IDEA),[17] the ADA, and state human rights laws.

(c) The 1970s: Persons with Severe Disabilities in the Community

In the early 1970s, special interest groups representing a number of distinct categories of persons with severe mental and physical disabilities—most notably, individuals with mental retardation, cerebral palsy, epilepsy, and autism—spearheaded the movement for disability rights in the community. The legal foundations for the community revolution were three pieces of federal legislation. The first was the Rehabilitation Act of 1973,[18] which offered vocational rehabilitation services on a national scale to qualifying persons with disabilities. More importantly, though, the Rehabilitation Act encouraged and, to a certain extent, mandated employment in the federal government and federally assisted programs. Of preeminent importance was Section 504,[19] which states:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

Significantly, §504 became the parent of the concept of "reasonable accommodation," as interpreted by the U.S. Supreme Court in its landmark decision,

14. 422 U.S. 563 (1975).
15. 494 U.S. 113 (1990), 14 *Mental & Physical Disability L. Rep.* (hereafter *MPDLR*) 116.
16. Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966).
17. 20 U.S.C. §1400 *et seq.*
18. 29 U.S.C. §701 *et seq.*
19. *Id.* at §794.

Southeastern Community College v. Davis.[20] In *Davis*, the Court ruled that under §504 recipients of federal monies had to make changes in the workplace or their programs to allow persons with disabilities to participate fully, unless the financial or administrative costs of implementing those changes were unduly burdensome.[21] Although first viewed as a major setback for those who wanted an unqualified commitment to change, reasonable accommodation has become an essential element of disability rights.

The second landmark legislative initiative was the Education for All Handicapped Children Act of 1975,[22] now known as the IDEA. Originally intended to help educate and train children with severe disabilities who were likely to be placed in institutions, the act pushed the entire disabilities rights movement forward by

- guaranteeing every child with a qualifying disability a free and appropriate public education,
- establishing extensive due process protections,
- mandating an individualized education program for every protected child, and
- creating a duty to mainstream students into regular classrooms, where appropriate.

The third important federal enactment was the 1978 amendments to the Developmental Disabilities Assistance and Bill of Rights Act,[23] which created a comprehensive program of services for persons with developmental disabilities and established a nationwide system of protection and advocacy systems (P&As) to protect their legal rights. Later, the system was extended to persons with mental illnesses through the Protection and Advocacy for Mentally Ill Individuals Act (PAMII).[24] Today, P&As constitute a prominent, but inadequately funded, source of legal advocacy and representation for persons with all types of disabilities in both community and institutional settings.

(d) The 1980s: Civil Rights for All Americans with Disabilities

In the 1980s, the disability rights movement turned towards self-advocacy and expanded its numbers. Many children with disabilities mainstreamed into society due to the IDEA; adults with disabilities worked because of the Rehabilitation Act; and former soldiers disabled in Vietnam became new leaders in the movement. These activists wanted to live independently in the community and, thus, focused on issues such as employment, housing, and architectural and attitudinal barriers.

20. 442 U.S. 397 (1979), 3 *MPDLR* 240.
21. *Id.* at 412.
22. Pub. L. No. 94-142, 89 Stat. 773 (1975).
23. 42 U.S.C. §15001 *et seq.*
24. *Id.* at §10801 *et seq.*

One of the most significant judicial decisions was the Supreme Court's unanimous opinion in *Alexander v. Choate*,[25] which held that §504 of the Rehabilitation Act permits challenges of neutral rules or policies that have a disproportionate impact on persons with disabilities. This case opened the doors for subsequent lawsuits based on disparate impact—as well as intentional discrimination—and was later incorporated into the ADA.

The first major federal disability legislative initiative to incorporate the 1980's expanded notion of disability rights was the Fair Housing Amendments Act of 1988 (FHAA).[26] Relying on principles from the Rehabilitation Act, the FHAA makes it illegal to discriminate on the basis of disability in housing matters, including real estate transactions, zoning matters, and the operations and services of apartments and condominiums. This push for independence led to the enactment of the ADA in 1990, and similar state legislation as well.

The FHAA signaled the development of a new "disability paradigm," which was fully reflected in the movement to enact the ADA. The "Emancipation Proclamation for persons with disabilities,"[27] as the ADA has been called, placed individuals with impairments at the forefront of the civil rights movement. The act was based in large part on §504 and its regulations. In particular, the ADA created a mandate to "modify the natural, constructed, cultural, and social environment"[28] in order to allow persons with disabilities equal participation in society. At the heart of this effort to change the way disability is perceived were laws and policies, like those contained in the ADA, designed to eliminate or reduce attitudinal and institutional barriers "to ensure meaningful inclusion of people with disabilities in mainstream society."[29]

1.02 Disability Rights Legislation Preceding the ADA

(a) Rehabilitation Act

Since 1973, the Rehabilitation Act[30] has prohibited federal government agencies and organizations that receive federal funds or federal contracts in excess of certain dollar amounts from discriminating against qualified individuals with disabilities.

Section 501 mandates that each federal agency establish and implement affirmative action programs that will provide "adequate hiring, placement, and advancement opportunities for individuals with disabilities."[31] Similarly, §503 requires that any employer who is awarded a federal contract providing more than $10,000 "shall take affirmative action to employ and advance in employment qualified individuals with

25. 469 U.S. 287 (1985), 9 *MPDLR* 57.
26. 42 U.S.C. §§3601-631.
27. 136 Cong. Rec. S9689 (daily ed. July 13, 1990) (statement of Sen. Harkin (D-Iowa)).
28. Robert Silverstein, "Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy," 85 *Iowa L. Rev.* 1691, 1695 (2000).
29. *Id.* at 1696.
30. 29 U.S.C. §791 ***et seq.***
31. *Id.* at §791(b).

disabilities."[32] Both sections prohibit discrimination on the basis of disability.

Section 504 covers federally funded employment and other types of programs and activities. It mandates that "otherwise qualified" individuals with disabilities cannot "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency" or the Postal Service.[33]

In terms of enforcement, the Rehabilitation Act does not contain a specific statute of limitations, meaning the applicable time limit for filing suits will differ from jurisdiction to jurisdiction. In general, courts have held that there is no private right of action under §503.[34] By contrast, there is such a private right for claims filed under §501[35] and §504,[36] although §501 claimants must first exhaust their administrative remedies.

Section 508 was created by amendments to the Rehabilitation Act in 1998.[37] According to those provisions, federal agencies are required to make their electronic and information technology accessible to persons with disabilities. The law governs federal agencies when they use, develop, or procure this technology, as well as private businesses that contract to provide the technology to those agencies.[38]

(b) Individuals with Disabilities Education Act (IDEA)

The early history of the right to a free appropriate public education for children with disabilities began with two seminal federal court decisions in 1972, which provided a detailed roadmap for the subsequent federal legislation. *Pennsylvania Association for Retarded Citizens v. Commonwealth*[39] and *Mills v. Board of Education of the District of Columbia*[40] relied on state statutes guaranteeing a public education for all state residents within a specified age group to find a corresponding right to public education for "handicapped" children. Pennsylvania and the District of Columbia were found to have violated due process by depriving these children of an equal opportunity to share in a state-funded public education through a hearing, periodic review of their status, and other procedures.[41] As a remedy, the federal courts ordered detailed due process protections that were incorporated, to a substantial extent, into the federal regulations implementing the Education for All Handicapped Children Act (EAHCA) of 1975,[42]

32. *Id.* at §793.
33. *Id.* at §794(a).
34. Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980), 4 *MPDLR* 83, 407; Clarke v. FELEC Servs., Inc., 489 F. Supp. 165 (D. Alaska 1980) 4 *Mental Disability L. Rep.* (hereafter *MDLR*) 248.
35. Mahon v. Crowell, 295 F.3d 585 (6th Cir. 2002), 26 *MPDLR* 825.
36. Lane v. Pena, 518 U.S. 187, 203–04 (1996), 20 *MPDLR* 550.
37. 29 U.S.C. §794d.
38. *Id.*
39. 343 F. Supp. 279 (E.D. Pa. 1972).
40. 348 F. Supp. 866 (D.D.C. 1972).
41. Pennsylvania Ass'n of Retarded Citizens v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).
42. Pub. L. No. 94-142, 89 Stat. 773 (1975).

which later became the IDEA.[43]

The most recent amendments to the IDEA were enacted in 1997.[44] This reauthorization and its implementing regulations constitute a comprehensive scheme to ensure a free appropriate public education for all children with disabilities. The IDEA is divided into four sections. Part A contains the statutory purpose and definitions of key terms.[45] Part B is a direct descendant of the EAHCA and includes provisions for funding, state plans, evaluations, eligibility, due process procedures, student discipline, and other direct services.[46] Part C focuses on the identification and provision of services to infants and toddlers under the age of three who are at risk of experiencing significant developmental delays without early intervention.[47] Part D attempts to address the need for a national program to help the states improve the provision of special education programs and services, including "coordinated research, personnel preparation, technical assistance, support, and dissemination of information."[48]

Currently, Congress, in reauthorizing the IDEA, is contemplating changes that would restrict protections for students with disabilities who misbehave or otherwise cause school disruptions.

(c) Fair Housing Amendments Act (FHAA)

The FHAA of 1988[49] extended the federal housing law's scope of coverage to persons with disabilities. Under these amendments, persons with disabilities may not be prevented from buying or renting private housing because of their disabilities, and reasonable accommodations must be provided to ensure that they are given equal opportunities to obtain housing. The FHAA applies to all housing sales and rentals, except private rentals and specifically excluded private sales.

The FHAA allows group home providers and other community residence operators to challenge exclusionary zoning practices. The U.S. Attorney General may file suit on behalf of these providers or operators if the Department of Housing and Urban Development (HUD) identifies improper zoning or land use practices.[50] Alternatively, a person claiming to be aggrieved by a discriminatory housing practice may commence a civil action in state or federal court within two years of the alleged discriminatory act and thereby bypass HUD's administrative process.[51]

1.03 Americans with Disabilities Act (ADA)

The ADA, as noted earlier, is a landmark civil rights statute that has had a profound effect on disability law. Its key components include the findings and purposes of the

43. 20 U.S.C. §1400 *et seq.*
44. Pub. L. No. 105-17, 111 Stat. 37 (1997).
45. 20 U.S.C. §§1400-406.
46. *Id.* at §§1411-419.
47. *Id.* at §§1431-445.
48. *Id.* at §§1451-456, 1461, 1471-474, 1481-487.
49. 42 U.S.C. §§3601-631.
50. *Id.* at §3610.
51. *Id.* at §3613(a)(1)(A) & (B).

ADA; its five titles; the definition of disability; specified or implied exclusions from coverage, particularly those for illegal drug use and sexual disorders; direct threats to health or safety; and reasonable accommodation/modification.

(a) Findings and Purposes

In enacting the ADA, Congress found that, historically, society has tended to isolate and segregate individuals with disabilities, and that despite improvements such forms of discrimination remain a serious and pervasive social problem.[52] Congress also found that persons with disabilities constitute a discrete and insular minority group. Based on characteristics beyond their control and stereotypical assumptions not truly indicative of their individual abilities to participate in and contribute to society, persons with disabilities have endured a history of unequal treatment, and have been relegated to a position of political powerlessness.[53]

Nevertheless, constitutional protections for persons with disabilities, as interpreted by the U.S. Supreme Court, do not reflect these congressional findings. Before the ADA was enacted—in *City of Cleburne v. Cleburne Living Center*[54] and afterwards in *Heller v. Doe*[55]—the U.S. Supreme Court rejected arguments that, for equal protection purposes, persons with mental disabilities—who are among the most vulnerable persons with disabilities—should be entitled to heightened judicial scrutiny or viewed as members of a suspect class.

(b) The ADA's Five Titles

The ADA is divided into five titles.[56] Title I[57] protects persons with disabilities from employment discrimination. With few exceptions, it covers most private and public employers who have 15 or more employees.

Title II[58] pertains to publicly owned and operated programs and enterprises, but in all likelihood does not include employment.[59] Part A[60] protects persons with disabilities from discrimination by public services, particularly state and local governments. Part B[61] protects persons from discrimination in public transportation, except for discrimination by airlines, which is governed by the Federal Aviation Administration and the Air Carrier Accesss Act. Specifically included in Part B are public bus services,

52. *Id.* at §12101(a)(2).
53. *Id.* at §12101(a)(7).
54. 473 U.S. 432 (1985), 9 *MPDLR* 278.
55. 509 U.S. 312 (1993), 17 *MPDLR* 338.
56. 42 U.S.C. §§12101-213.
57. *Id.* at §§12111-117.
58. *Id.* at §§12131-165.
59. *See* Currie v. Group Ins. Comm'n, 290 F.3d 1 (1st Cir. 2002), 26 *MPDLR* 550. *See also* Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999), 23 *MPDLR* 543. *But see* Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998), 22 *MPDLR* 211.
60. 42 U.S.C. §§12131-134.
61. *Id.* at §§12141-165.

intercity and commuter rail services, and facilities owned or used by these transportation systems.

Title III[62] prohibits discrimination in public accommodations and services operated by private entities. Generally, a public accommodation is a business that engages in interstate commerce and holds itself out to the public as providing goo Public accommodations include restaurants, theaters, hotels, ret recreational facilities.[63]

Title IV[64] establishes telecommunications relay services for perso and speech impairments.

Title V[65] incorporates miscellaneous provisions of the act, includin is to be construed; certain state immunities; attorneys' fees; coverag and exclusions of persons currently using illegal drugs or engaging in c sexual behaviors.

(c) Reasonable Accommodation/Modification

An essential concept that differentiates the ADA and related c legislation from other kinds of civil rights statutes is the notion accommodation or modification. The ADA requires those entities co to take "reasonable" steps that will allow qualified persons with opportunity to work[66] or to participate in programs and activities offere Legally, the duty to create such accommodations or modifications i Under Title I, an accommodation is unreasonable if it creates an "undue hardship" on the employer. Factors courts should consider include the nature and cost of the accommodations; the overall financial resources of the facility involved in providing the accommodations; the overall financial resources of the covered entity; and the type of operation(s) performed by the entity.[68] Under Titles II and III, modifications are unreasonable if they "fundamentally alter" the program or service being provided, or are not readily achievable.[69]

(d) ADA Definition of Disability

The Three-Prongs

Under the ADA, the definition of disability has three prongs,[70] covering both actual

62. *Id.* at §§12181-189.
63. *Id.* at §12181(7).
64. 47 U.S.C. §225, §611.
65. 42 U.S.C. §§12201-213.
66. *Id.* at §12112(b)(5).
67. *Id.* at §12182(b)(2)(A)(ii).
68. *Id.* at §12111(10)(B)(i)-(iv).
69. *Id.* at §12182(b)(2)(A)(ii)(iv). *See* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001), 25 *MPDLR* 324.
70. 42 U.S.C. §12102(2).

and perceived impairments. The first prong includes persons who have actual impairments that substantially limit one or more major life activities. Under this prong, employees (or job applicants) must first demonstrate that they have a physical or mental impairment. A physical impairment broadly includes "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine."[71]

A mental impairment, in turn, encompasses "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[72] According to the Equal Employment Opportunity Commission (EEOC), the current edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is "relevant" for identifying mental disorders.[73]

Working, thinking, walking, breathing, and interacting with others are examples of major life activities.[74] A diagnosis of a mental or physical condition does not, by itself, establish a substantial limitation, even for severe impairments such as paralysis, seizure disorders, cancer, mental retardation, or schizophrenia. Rather, a substantial limitation is measured by objective criteria, such as the impairment's nature, severity, expected duration, and long-term effects.

Recently, the Tenth Circuit differentiated those aspects of the ADA's disability definition that are for the courts to decide from those that are for a jury or trier of fact to decide.[75] While courts are to determine whether a qualifying impairment exists and what constitutes a major life activity, it is up to a jury (or trier of fact) to determine whether an impairment is substantially limiting based on criteria that courts establish. The U.S. Supreme Court indicated that, in general, the measurement of what constitutes a substantial impairment of a major life activity may be defined quite broadly. For example, in *Bragdon v. Abbott*,[76] a 5-4 majority concluded that asymptomatic HIV was an impairment under the ADA, and that its effect on the female plaintiff's major life activity of reproduction constituted a substantial limitation.

At the same time, a subsequent trilogy of Supreme Court decisions—*Sutton v. United Air Lines, Inc.*,[77] *Albertson's v. Kirkingburg*,[78] and *Murphy v. United Parcel*

71. 29 C.F.R. §1630.2(h)(1).
72. *Id.* at §1630.2(h)(2).
73. EEOC, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (Mar. 25, 1997), 21 *MPDLR* 406, at http://www.eeoc.gov/docs/psych.html.
74. *See* Bartlett v. New York State Bd. of Law Exam'rs, 226 F.3d 69, 80 (2d Cir. 2000), 24 *MPDLR* 980 (reading and working are major life activities); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 307 (3d Cir. 1999), 23 *MPDLR* 841 (regarding thinking as a major life activity); McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999), 23 *MPDLR* 843, *amended*, 201 F.3d 1211 (2000) (finding that interacting with others "easily falls within the definition of 'major life activity'").
75. Bristol v. Board of County Comm'rs of Clear Creek County, 281 F.3d 1148 (10th Cir. 2002), 26 *MPDLR* 466, *vacated on other grounds*, 312 F.3d 1213 (10th Cir. 2002), 27 *MPDLR* 118.
76. 524 U.S. 624 (1998), 22 *MPDLR* 449.
77. 527 U.S. 471 (1999), 23 *MPDLR* 510.
78. 527 U.S. 555 (1999), 23 *MPDLR* 511.

Services, Inc.[79]—sharply limited one significant aspect of the scope of the disability definition. The 7-2 majority opinions concluded that for persons who are benefiting from measures to correct for or mitigate an impairment, the decision as to whether an impairment constitutes a substantial limitation must be made by assessing the impairment in its mitigated or corrected state.[80] For example, if the plaintiff is taking insulin for diabetes, the assessment of whether that plaintiff has a covered disability must be made by measuring that medication's positive and negative effects on his or her condition. Moreover, even if the mitigation is due to naturally occurring phenomenon, such as the body's ability to adapt and compensate for an impairment, the plaintiff's condition must be viewed in its improved state.[81]

However, merely because a condition is mitigated does not mean that it cannot be a covered disability. The Seventh Circuit ruled, for instance, that an employee with diabetes had a substantially limiting impairment, even though he was being treated with insulin.[82] Despite the medication, he could not eat when and where he wanted to, or exert himself without being concerned about the effect his activity would have on his glucose levels. That same circuit concluded that a lower court had erred in not considering how an employee's mobility impairment could be mitigated to allow her to walk further before ruling that she had a covered disability.[83]

In light of several federal court decisions[84] and interpretive guidance by the EEOC and Department of Justice (DOJ) in their regulations on the subject,[85] it also appears that an actual impairment that is transitory is not a covered disability if, at the time of the alleged ADA violation, the impairment did not impose a substantial limitation on a person's major life activities. Determining the degree of impairment at a specific point of time for a condition that is changing is difficult. At certain points in time the condition is substantially limiting, while at other times it is not. Moreover, if there is more than one violation or the violation is continuing, the possible permutations of outcomes may increase geometrically.

The second prong of the ADA definition covers persons who are being discriminated against by a covered entity based on a record that documents that the person had or has an impairment that substantially limits a major life activity.[86] Compared to the other two prongs, this prong is rarely cited in the case law. The Eighth Circuit, for example, concluded that merely because a plaintiff was hospitalized for treatment of his carpal tunnel syndrome did not establish a record of impairment

79. 527 U.S. 516 (1999), 23 *MPDLR* 511.
80. *See Sutton*, 527 U.S. 471, 482; *Kirkingburg*, 527 U.S. 555, 565-66; *Murphy*, 527 U.S. 516, 521.
81. *See Kirkingburg*, 527 U.S. at 565-67.
82. Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001), 25 *MPDLR* 395.
83. EEOC v. Sears, Roebuck & Co., 233 F.3d 432 (7th Cir. 2000), 25 *MPDLR* 85.
84. Ryan v. Grae & Rybicki, P.C., 135 F.3d 867 (2d Cir. 1998), 22 *MPDLR* 195; Popko v. Pennsylvania State Univ., 84 F. Supp. 2d 589 (M.D. Pa. 2000), 24 *MPDLR* 422, *aff'd*, 254 F.3d 1078 (3d Cir. 2001) (table).
85. *ADA Title I EEOC Interpretive Guidance* on 29 C.F.R. §1630.2(j)(2); *ADA Title II DOJ Interpretive Guidance* on 28 C.F.R. §35.104; *ADA Title III DOJ Interpretive Guidance* on 28 C.F.R. §36.104 (2002).
86. 42 U.S.C. §12102(2)(B).

constituting a disability.[87] The Seventh Circuit, on the other hand, determined that a plaintiff with diabetes, who had received Social Security disability benefits for 12 years, presented sufficient evidence of a record of a substantially limiting impairment to overturn summary judgment for his employer.[88]

The third prong covers persons who are regarded by a covered entity as having an impairment that substantially limits a major life activity.[89] For instance, the Tenth Circuit affirmed an award under Title I, finding that the employer had discriminated against a job applicant based on a perceived disability related to his having previously received workers' compensation benefits.[90] However, the Second Circuit ruled that merely because a police officer had to take an anticoagulant blood thinner for the rest of his life did not mean his employer regarded his condition as substantially limiting the major life activity of working.[91]

Under each of these prongs, an essential component of the disability definition is the meaning of substantial limitation. Until recently, there was no one standard courts used to make this determination. That changed, however, in 2002 when the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*[92] unanimously ruled that the test is whether the claimant has "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."[93]

This new test is significant in two respects. On the one hand, the Court seems to have taken a relatively broad view of what constitutes a major life activity. In the context of a worker with carpal tunnel syndrome, the term included "household chores, bathing, and brushing one's teeth."[94] A great many different impairments produce symptoms that significantly affect these types of life activities.

On the other hand, the Court took a much stricter view of what constitutes a substantial limitation, specifically excluding conditions that "caused [the claimant] to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances."[95] Moreover, the fact that the Court requires an impairment to be permanent or long-term is likely to have a particularly restrictive impact on illnesses that may be episodic or controlled by medications, such as mental conditions, epilepsy, diabetes, or cancer.

87. Gutridge v. Clure, 153 F.3d 898 (8th Cir. 1998), 22 *MPDLR* 748.
88. Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001), 25 *MPDLR* 395.
89. 42 U.S.C. §12102(2)(C).
90. Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955 (10th Cir. 2002), 26 *MPDLR* 667. *See also* Riemer v. Illinois Dep't of Transp., 148 F.3d 800 (7th Cir. 1998), 22 *MPDLR* 601.
91. Giordano v. City of N.Y., 274 F.3d 740 (2d Cir. 2001), 26 *MPDLR* 259.
92. 534 U.S. 184 (2002), 26 *MPDLR* 73.
93. *Id.* at 198.
94. *Id.* at 202.
95. *Id.*

Association/Relationship with Individual with Disability

A fourth group of protected individuals under the ADA are persons who have an association or relationship with an individual who is known to have a disability.[96] The EEOC regulations broadly describe the relationship or association as including "family, business, social or other. . . ."[97] Discrimination against this category of individuals is defined under the ADA Title I as "excluding or otherwise denying equal job or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."[98] A similar statutory reference is found under the ADA Title III, which prohibits discrimination by public accommodations.[99]

While the discrimination prohibition is broad under Title I, encompassing job benefits, it is limited in two important respects. First, the inclusion of the word "known" in the definition means that the employer (or public accommodation) must be aware of the association between the employee or applicant (or customer/client) and the person with a disability. Second, the employer (or public accommodation) does not have to provide reasonable accommodations or modifications to someone who has an association or relationship with a person known to have a disability.[100]

Exclusions for Drug Use and Sexual Disorders

A person who currently uses a controlled substance for unlawful purposes, including taking a prescribed drug without the required supervision of a licensed health care professional, does not have a qualifying disability under the ADA.[101] Although the ADA protects persons who participate in or have completed supervised drug rehabilitation programs and no longer use illegal drugs,[102] court interpretations of what constitutes a current drug abuse problem may include a substantial amount of time after the person has ceased taking drugs or entered a treatment program. For instance, the Fourth Circuit concluded that a nurse anesthetist was a current illegal drug user because she had taken those drugs in a periodic fashion during "the weeks and months prior to discharge."[103] However, the Ninth Circuit ruled that an employer's blanket policy—barring the rehiring of employees who were terminated, or resigned in lieu of termination, due to their breach of the company's code of conduct—violated the ADA

96. 42 U.S.C. §12112(b)(4).
97. 29 C.F.R. §1630.8.
98. 42 U.S.C. §12112(b)(4).
99. *Id.* at §12182(b)(1)(E).
100. 29 C.F.R. Pt. 1630, App. (commentary on §1630.8).
101. 42 U.S.C. §12114(a); 29 C.F.R. §1630.3(a).
102. *Id.* at §12114(b); 29 C.F.R. §1630.3(b).
103. Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 280 (4th Cir. 1997), 21 *MPDLR* 334, *abrogated on other grounds*, Baird v. Rose, 192 F.3d 462 (4th Cir. 1999), 23 *MPDLR* 835. *See also* Corrections Corp. of Am. v. Human Relations Comm'n City of Youngstown, 742 N.E.2d 1177 (Ohio Ct. App. 2000), 24 *MPDLR* 936.

as applied to employees who were terminated for illegal drug use in the workplace, but had been rehabilitated.[104] The U.S. Supreme Court has granted *certiorari* in this case.[105]

The ADA also excludes sexual compulsions, preferences, and disorders from its coverage. Specifically, the act excludes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, [and] gender identity disorders not resulting from physical impairments or other sexual behavior disorders."[106] In addition, the act excludes disorders related to "compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs."[107]

Direct Threat to Health or Safety

The current definition of direct threat to health or safety originated in the U.S. Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*.[108] There, in determining whether a teacher with tuberculosis was "otherwise qualified" under §504 of the Rehabilitation Act, the justices directed the lower court to assess the nature, duration, and severity of the risk to other parties; the probabilities that the disease will be transmitted and cause harm; and whether any reasonable accommodation will ameliorate the risks.[109]

People who have disabilities that pose a "direct threat" are not qualified for the goods, service, or job that is the subject of the litigation and, thus, are not protected by the ADA.[110] The ADA states that a "direct threat" applies to the health or safety of others,[111] but says nothing about threats to oneself. However, in *Chevron U.S.A. Inc. v. Echazabal*,[112] a unanimous U.S. Supreme Court found that the EEOC had acted properly in enacting regulations stating that the direct threat provision covers health or safety to oneself.

At the same time, *Chevron* expanded on what the Court had held in *Arline* about how direct threats should be assessed, but did so in the employment context. The justices embraced the EEOC regulations,[113] stating that employers must show that their conclusions are,

> "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform

104. Hernandez v. Hughes Missile Sys., 298 F.3d 1030 (9th Cir. 2002), 26 *MPLDR* 1050.
105. Raytheon Co. v. Hernandez, 123 S. Ct. 1255 (2003), 27 *MPDLR* 371.
106. 42 U.S.C. §12211(b)(1).
107. *Id.* at §12211(b)(2)-(3).
108. 480 U.S. 273 (1987), 11 *MPDLR* 110.
109. *Id.* at 274.
110. 42 U.S.C. §12113(b).
111. *Id.*; *id.* at §12182(b)(3).
112. 536 U.S. 73 (2002), 26 *MPDLR* 588.
113. 29 C.F.R. §1630.2(r).

> the essential functions of the job," reached after considering, among other things, the imminence of the risk and severity of the harm portended.[114]

Apparently, this degree of objective medical evidence was presented where the Fourth Circuit affirmed a lower court ruling that a boy with AIDS posed a direct threat to other martial arts students, and that no reasonable modification under the ADA would sufficiently reduce the threat he presented without fundamentally altering the nature of the martial arts program.[115] Yet, the necessary evidence was found to be lacking in a case brought under the Fair Housing Amendments Act where New Jersey had enacted two statutory provisions that made insanity acquittees automatically ineligible for admission to community residences without providing for an individualized determination as to whether each tenant currently posed a danger to others.[116]

1.04 ADA Enforcement Provisions

(a) Introduction

Many of the ADA's key provisions do not extend as far as disability rights advocates had hoped initially, particularly the definition of disability previously discussed in 1.03. Moreover, the ADA has been further limited by gaps in enforcement. Congress intended that there be "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[117] The ADA's enforcement mechanisms, both administrative and judicial, were supposed to offer potent remedies for people with disabilities covered by the statute, comparable to remedies available for discrimination on the basis of race, religion, gender, or national origin. Nevertheless, the scope and effectiveness of the various mechanisms vary significantly by which title of the ADA is at issue. In particular, because the ADA covers discrimination in several different arenas—including employment, public programs and activities, public accommodations, and communications—enforcement of each title incorporates principles drawn from different statutes in existence before the ADA was enacted, such as the Communications Act of 1934,[118] the Civil Rights Act of 1964,[119] and the Rehabilitation Act of 1973.[120]

While each ADA title has its own enforcement mechanisms, several common principles are pertinent to either all or several titles:

- Prohibited discrimination under the ADA includes both intentional actions/

114. *Chevron*, 536 U.S. at 86 (citing 29 C.F.R. §1630.2(r)).
115. Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999), 23 *MPDLR* 150.
116. In re Commitment of J.W., 672 A.2d 199 (N.J. Super. Ct. App. Div. 1996), 20 *MPDLR* 376.
117. 42 U.S.C. §12101(b)(2).
118. 47 U.S.C. §201 *et seq.*
119. 42 U.S.C. §2000e-1–17.
120. 29 U.S.C. §701 *et seq.*

omissions and disparate impact on otherwise neutral policies, although a split exists in the federal circuits as to whether intentional discrimination should be ascertained using deliberate indifference, which is the majority view,[121] or a discriminatory animus.[122]

- While the vast majority of ADA cases have been decided by federal courts, state and federal courts share *concurrent jurisdiction*, meaning that a plaintiff may file suit in either forum.[123]
- If the ADA does not specify a *statute of limitations* for filing a particular type of lawsuit, courts apply what they determine to be the most analogous state statute of limitations period.[124]
- *Class actions* are permitted for ADA claims,[125] but certification may be denied if individualized inquiries are needed to determine whether each potential member of the class has a disability.[126]
- Because of the Congressional Accountability Act of 1995,[127] Congress—which originally was largely exempt from the ADA's enforcement provisions—is now largely covered by the enforcement provisions found in Titles I, II, and III.

In addition to the specific enforcement mechanisms detailed in Titles I through IV, Title V has general enforcement provisions dealing with retaliation, coercion, alternative dispute resolution, and the relationship of the ADA to other federal and state laws.

(b) Specific ADA Enforcement Provisions by Title

Title I: Employment Discrimination

While Title I has generated more litigation than all the other ADA titles combined, it arguably has been the most difficult to enforce. The Title I provision for enforcing the prohibitions against disability-based employment discrimination[128] expressly adopts the mechanisms and remedies of Title VII of the Civil Rights Act of 1964.[129] Both

121. Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001), 25 *MPDLR* 898; Bartlett v. New York State Board of Law Exam'rs, 156 F.3d 321 (2d Cir. 1998), 22 *MPDLR* 790, *vacated on other grounds*, 527 U.S. 1031 (1999); Powers v. MJB Acquisition Corp., 184 F.3d 1147 (10th Cir. 1999), 23 *MPDLR* 702.
122. Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 670 (7th Cir. 2000), 25 *MPDLR* 82.
123. Jones v. Illinois Cent. R.R., 859 F. Supp. 1144 (N.D. Ill. 1994), 18 *MPDLR* 533; Kuechle v. Life's Companion, Inc., 653 N.W.2d 214 (Minn. Ct. App. 2002), 27 *MPDLR* 97.
124. Conners v. Maine Med. Ctr., 42 F. Supp. 2d 34, 52 (D. Me. 1999), 23 *MPDLR* 408; Kramer v. Regents of Univ. of Cal., 81 F. Supp. 2d 972, 973 (N.D. Cal. 1999), 24 *MPDLR* 195.
125. Fed. R. Civ. P. 23(a) & (b); *See also* Marcus v. Kansas Dep't of Revenue, 206 F.R.D. 509 (D. Kan. 2002), 26 *MPDLR* 611; EEOC v. Northwest Airlines, Inc., 216 F. Supp. 2d 935 (D. Minn. 2002), 26 *MPDLR* 1046.
126. Davoll v. Webb, 194 F.3d 1116, 1146 (10th Cir. 1999), 24 *MPDLR* 258.
127. 2 U.S.C. §1311 *et seq.*
128. 42 U.S.C. §12117.
129. *Id.* at §2000e1–17.

administrative and judicial enforcement are available. This is important, because cases decided under Title VII also are generally applicable to the ADA Title I.

The EEOC is responsible for the administrative enforcement of both Title VII and the ADA Title I. As the U.S. Supreme Court noted recently,[130] complainants must file formal charges with the agency within 180 days of the alleged discriminatory act. However, in states or localities with an anti-discrimination law and an agency authorized to grant or seek relief, complainants must present a charge to that state or local agency and may file charges with the EEOC within 300 days of the discriminatory act, or 30 days after receiving notice that the state or local agency has terminated its processing of the charge, whichever is earlier.[131] In the same case, the justices also determined that charges that involve a hostile work environment will not be barred, as long as all the acts that make up that charge are part of the same unlawful practice, and at least one of those acts falls within the filing period. The majority noted that courts may apply equitable doctrines that toll or limit the applicable limitations period if allowing the hostile environment claim to be filed would be inequitable to the employer.[132]

In investigating a charge, the EEOC may review statements filed by the parties, interview them, request information, and issue administrative subpoenas. If the EEOC finds reasonable cause to believe discrimination has occurred, the agency must attempt to resolve the charge through conciliation between the parties before a lawsuit is filed.[133]

The EEOC is also responsible for coordinating its Title I administrative enforcement procedures with the Department of Labor (DOL) and Department of Justice (DOJ) procedures for enforcing disability-based discrimination under the Rehabilitation Act.[134] Coordination is important because of Title I's overlapping jurisdiction with sections 503 and 504 of the Rehabilitation Act,[135] which cover employment involving government contracts and federally assisted programs, respectively. The coordination rules are meant to ensure that complaints under either law are addressed in a manner that avoids duplication and prevents inconsistent or conflicting legal standards from being imposed. Complaints filed with either the DOL or the DOJ will be considered as charges simultaneously filed with the EEOC, and vice versa, whenever the subject matter falls under both the ADA and the Rehabilitation Act.[136]

If the EEOC cannot resolve a discrimination complaint through its administrative process, either the EEOC or the U.S. Attorney General may file a civil action.[137] The EEOC may bring such actions against non-government entities, and the Attorney General may bring actions against government entities if reasonable cause exists to

130. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109-10 (2002), 26 *MPDLR* 693 (citing 42 U.S.C. §2000e-5(e)(1)).
131. 42 U.S.C. §2000e-5(e)(1). *See also* http:/www.eeoc.gov/facts/howtofil.html.
132. *Morgan*, 536 U.S. at 121–22.
133. 29 C.F.R. §§1601.15, .16, .17, .24.
134. 42 U.S.C. §12117(b); 28 C.F.R. §§37.1–.13; 29 C.F.R. §§1641.1–.8, 1640.1–.13; 41 C.F.R. §§60-742.1–.8.
135. 29 U.S.C. §§793, 794.
136. 29 C.F.R. §§1641.5, .6; 28 C.F.R. §§37.7–.8.
137. *Id.* at §1601.23.

believe a pattern or practice of discrimination has occurred. No statute of limitations governs general civil actions brought by the EEOC or the Attorney General.

The EEOC may issue a "right-to-sue" letter to a complainant 180 days after a charge is filed.[138] If administrative review exceeds 180 days, the complainant may seek a right-to-sue letter from the EEOC, which then must issue it.[139] Receipt of such a letter is a prerequisite to filing a private right of action. Thus, courts have found that failure to obtain a right-to-sue letter bars a litigation claim under Title I.[140] Individuals must file their court actions within 90 days of receiving the letter.[141]

Complainants, subject to certain equitable considerations, must exhaust administrative remedies before bringing private lawsuits to remedy employment discrimination under Title I. For instance, where a fired employee refused to bring an administrative complaint before filing a lawsuit, a federal court dismissed her Title I claim.[142] However, where a woman attempted to file an EEOC charge three times but was rejected each time, a federal court refused to sanction her attorney for failing to exhaust administrative remedies, because her good faith efforts may have excused any non-compliance with the exhaustion requirement.[143]

Remedies available under Title I include both monetary damages and equitable relief. Although compensatory and punitive damages were not originally available under Title I, the Civil Rights Act of 1991[144] amended Title VII of the Civil Rights Act of 1964 to allow such damages. Consequently, ADA Title I plaintiffs can collect damages for intentional discrimination.

In 1999, two U.S. Supreme Court decisions addressed damages under Title VII. In the first, a 5-4 majority ruled that the EEOC can direct federal agencies to pay compensatory damages in discrimination cases involving federal employees.[145] While this decision does not affect claims brought under the ADA Title I, it affects claims filed under §501 Rehabilitation Act,[146] the federal statute that prohibits disability discrimination by federal agencies.

Shortly thereafter, a different 5-4 Court majority concluded that under Title VII an employer's conduct does not have to be "egregious" in order to award punitive damages, as long as it can be shown that the employer acted with "malice" and "reckless indifference."[147] The Court stated explicitly that under the 1991 Civil Rights Act, which

138. 42 U.S.C. §2000e-5(e)(1).
139. Churchill v. Star Enters., 183 F.3d 184, 191 (3d Cir. 1999), 23 *MPDLR* 706.
140. *See* Dollinger v. New York Ins. Fund, 44 F. Supp. 2d 467, 476 (N.D.N.Y. 1999), 23 *MPDLR* 519. *But see* Parry v. Mohawk Motors of Mich., 236 F.3d 299, 309 (6th Cir. 2000), 25 *MPDLR* 238 (citing Rivers v. Barberton Bd. of Educ. 143 F.3d 1029, 1031-32 (6th Cir. 1998)).
141. 42 U.S.C. §2000e-(5)(f)(1).
142. Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275 (1st Cir. 1999), 24 *MPDLR* 101; Dao v. Auchan Hypermarket, 96 F.3d 787 (5th Cir. 1996), 20 *MPDLR* 844.
143. Austin v. Owens-Brockway Glass Container, Inc., 844 F. Supp. 1103 (W.D. Va. 1994), 18 *MPDLR* 534, *aff'd on other grounds*, 78 F.3d 875 (4th Cir. 1996).
144. 42 U.S.C. §1981a.
145. West v. Gibson, 527 U.S. 212 (1999), 23 *MPDLR* 543.
146. 29 U.S.C. §791.
147. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999), 23 *MPDLR* 544.

applies to the ADA Title I, plaintiffs may also recover compensatory damages, back pay, and other equitable relief.

Even though damages are permitted in a variety of circumstances, the aggregated amount of damages is capped depending on the employer's size.[148] The relatively modest maximum award if the employer has 15 to 100 employees is $50,000; 101 to 200 employees, $100,000; 201 to 500 employees, $200,000; and more than 500 employees, $300,000. Accordingly, an Illinois federal court reduced a jury's punitive damages award to a discharged employee with cancer to $150,000 from the employing company, so that the total—when combined with the $50,000 compensatory damages award—did not exceed the $200,000 limitation for a company with 201 to 500 employees.[149] In making these calculations, however, it should be noted that back or front pay "are not subject to this cap."[150]

Moreover, if an employer can prove that the employee would have been discharged anyway without considering his or her disability,[151] the Eighth Circuit limited an employer's liability to a declaratory judgment, an injunction that does not include reinstatement or back pay, attorneys' fees, and costs.[152]

Finally, under both Title VII and the ADA Title I, employers are required to file informational reports and maintain related records. Employers with 100 or more employees who fail to comply are subject to administrative and judicial enforcement procedures similar to those provided for employment discrimination. Allegations are subject to EEOC investigation, and either the EEOC or the U.S. Attorney General can bring a civil suit to compel compliance. Penalties for willfully making false statements may include fines and imprisonment for up to five years.[153]

Despite the EEOC's broad enforcement powers, the implementation of those powers has been constrained by a lack of resources. According to a comprehensive study of the EEOC's ADA mandate released in 2001,

> the Agency has always struggled with more complaints than it could properly handle, while for most of its existence it has also tried to develop and maintain an effective program of enforcement litigation. To be sure, charges that are not resolved by the EEOC may be carried forward into lawsuits, but early data from our current research on these suits indicate that only a small percentage of ADA claimants are willing or able to take advantage of this opportunity. Litigation is more expensive than the administrative process, and litigation virtually always requires the services of an attorney to be successful.[154]

148. 42 U.S.C. §1981a(b)(3).
149. EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571 (N.D. Ill. 1993), 17 *MPDLR* 605, *rev'd on other grounds*, 55 F.3d 1276 (7th Cir. 1995), 19 *MPDLR* 460. *See also* Tart v. Elementis Pigments, Inc., 191 F. Supp. 2d 1019 (S.D. Ill. 2001), 26 *MPDLR* 510.
150. *Tart*, 191 F. Supp. 2d at 1024.
151. *See* 42 U.S.C §2000e-5(g)(2)(B).
152. Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300 (8th Cir. 1995), 19 *MPDLR* 616.
153. 29 C.F.R. Pt. 1602.
154. Kathryn Moss et al., "Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission," 50 *Kan. L. Rev.* 1, 3 (2001).

Moreover, according to surveys of Title I court decisions—covered in the American Bar Association's *Mental & Physical Disability Law Reporter*—those relatively few plaintiffs who have sued their employers were unsuccessful in a vast majority of the cases, prevailing less than 10 percent of the time from 1992-97, and less than 6 percent of the time from 1998-2002.[155] In addition, as is discussed later in 1.07, both Title I and Title II enforcement against state defendants has been severely constrained by sovereign immunity considerations.

Title II: State and Local Government Services

Title II enforcement is divided into two separate components dealing with discrimination and public transportation, respectively.

(i) Discrimination Under Subtitle A

Title II, subtitle A, states that the "remedies, procedures, and rights" set forth under Section 504 of the Rehabilitation Act shall be available to anyone alleging disability-based discrimination in any public service, program, or activity.[156] Section 504 in turn incorporates the "remedies, procedures, and rights" established under Title VI of the Civil Rights Acts of 1964.[157] Both administrative and judicial enforcement mechanisms are available.

Eight federal departments have substantial enforcement authority under Title II: the Departments of Agriculture; Education; Health and Human Services; Housing and Urban Development; Interior; Justice; Labor; and Transportation. This authority is shared based on the intended scope of the agencies' regulatory responsibilities. The DOJ is responsible for all state and local government entities not clearly designated. Individuals alleging discrimination in a public service covered by Title II must file a complaint with the appropriate agency within 180 days of the alleged discrimination. Complaints may be filed with either a designated federal agency, the agency that provides funding to the public entity, or the DOJ for referral to the appropriate agency. The investigating agency must first attempt informal resolution—that is, settlement without negotiations. If this fails, the agency will issue a "letter of findings" and pursue voluntary compliance with the public entity. The agency will initiate negotiations between the parties and, if successful, will secure a written voluntary compliance agreement from that public entity.[158]

If a public entity declines voluntary compliance or if no written agreement is obtained after negotiations, the agency will refer the matter to the U.S. Attorney General, who may bring a civil suit to enforce Title II. Private parties also may bring a lawsuit

155. Amy L. Allbright, "2002 Employment Decisions Under the ADA Title I—Survey Update," 27 *MPDLR* 387.
156. 42 U.S.C. §12133.
157. 29 U.S.C. §794a(2).
158. 28 C.F.R. §35.173.

to enforce their rights under Title II at any time, regardless of whether an administrative agency has found a violation.[159] This scheme is different from the one set forth under Title I, in which the plaintiff must first receive a "right-to-sue" letter. Exhaustion of administrative remedies is not required under Title II, even where the plaintiff alleges employment discrimination against the public entity and could have filed his or her claim under Title I instead.[160]

Equitable relief—meaning declaratory and injunctive relief—is available under Title II.[161] A court can order a public entity to make its facilities accessible, to provide auxiliary aids or services, or to modify its policies. As compared to Title I, however, damages are more limited. Punitive damages are never available,[162] and compensatory damages appear to be limited to instances in which intentional, as opposed to disparate, discrimination has been proven.[163]

(ii) Public Transportation Under Subtitle B

Subtitle A's enforcement mechanisms are generally applicable to subtitle B, which applies to public—as opposed to private—transportation services.[164] The DOT is the designated agency for filing complaints under this subtitle.[165] Additional specific enforcement provisions for subtitle B[166] provide that if a public entity does not voluntarily comply with ADA requirements and the DOT has conducted a hearing and found a violation, the DOT may suspend, terminate, or refuse to grant or continue federal financial assistance, in addition to any other enforcement options available.

Title III: Public Accommodations

Title III contains detailed provisions for enforcing the anti-discrimination and accessibility requirements for public accommodations, including private transportation services.[167] Title III's enforcement scheme is modeled after Title II of the Civil Rights Act of 1964, which authorizes declaratory and injunctive relief in civil actions brought

159. *Id.* at §35.172. *See, e.g.*, Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993), 18 *MPDLR* 143. *See also* King v. Indiana Family & Soc. Serv. Admin., 774 N.E.2d 1008 (Ind. Ct. App. 2002), 27 *MPDLR* 149.
160. Dertz v. City of Chicago, 912 F. Supp. 319 (N.D. Ill. 1995), 19 *MPDLR* 749. *See also* Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998), 22 *MPDLR* 211.
161. 42 U.S.C. §12133. *See, e.g.*, Tyler v. City of Manhattan, 849 F. Supp. 1442 (D. Kan. 1994), 18 *MPDLR* 383, *aff'd*, 118 F.3d 1400 (10th Cir. 1997), 21 *MPDLR* 593; Pathways Psychological v. Town of Leonardtown, 223 F. Supp. 2d 699 (D. Md. 2002), 26 *MPDLR* 1079.
162. Barnes v. Gorman, 536 U.S. 181 (2002), 26 *MPDLR* 609.
163. Bartlett v. New York Bd. of Law Exam'rs, 156 F.3d 321 (2d Cir. 1998), 22 *MPDLR* 790, *judgment vacated*, 527 U.S. 1031 (1999), *on remand*, 226 F.3d 69 (2d Cir. 2000), 24 *MPDLR* 980. *See also* Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir. 1997), 21 *MPDLR* 593.
164. 42 U.S.C. §12141.
165. 49 C.F.R. Pts. 37 & 38.
166. 49 C.F.R. §27.125.
167. 42 U.S.C. §12188.

by either private individuals or the U.S. Attorney General.[168]

Someone alleging a Title III violation may file an administrative complaint with the U.S. Attorney General, who investigates complaints and undertakes periodic compliance reviews of covered entities when there is reason to believe that a violation has occurred.[169]

The Attorney General also has the power to certify that a state law or local government building code or similar ordinance establishes accessibility requirements that meet or exceed minimum ADA requirements. A state or local government entity must apply to the Attorney General for this certification, after which the Attorney General will hold a public hearing to evaluate the applicable law or ordinance.[170]

The Attorney General may bring civil actions when a pattern or practice of disability-based discrimination is alleged and reasonable cause exists to believe that a violation has occurred, or when the charge raises an issue of general public importance.[171] At the Attorney General's request, the court may award monetary damages to compensate an aggrieved party. In addition, to vindicate the public interest in a case brought by the Attorney General, the court may assess civil penalties of up to $55,000 for the first violation, and up to $110,000 for each subsequent violation. A public accommodation's honest efforts to comply with Title III's requirements, however, should be considered in determining the amount, if any, of penalties that should be charged against the entity.[172] Moreover, the statute makes clear that courts may not assess punitive damages.[173]

Private parties may bring lawsuits to enforce Title III independent of the Attorney General, but monetary damages are not available.[174] Unlike Title I's requirements, an aggrieved person is not required to exhaust administrative remedies before filing a court action. A private action is available to any individual who is being—or who has reasonable grounds to believe that he or she is about to be or has been—subjected to discrimination on the basis of disability.[175] Courts may grant injunctive relief to private parties by ordering defendants to make their facilities accessible, to provide auxiliary aids or services, or to modify their policies.[176] However, a private individual alleging only past discrimination without alleging current or future discriminatory conduct does not have standing to obtain injunctive relief under Title III.[177]

168. 28 C.F.R. §36.501.
169. *Id.* at §36.502.
170. 42 U.S.C. §12188(b)(1)(A)(ii).
171. 28 C.F.R. §36.503.
172. *Id.* at §36.504.
173. 42 U.S.C. §12188(b)(4).
174. 28 C.F.R. §36.501.
175. *Id.*
176. 42 U.S.C. §12188(a)(2).
177. *See, e.g.*, Hoepfl v. Barlow, 906 F. Supp. 317 (E.D. Va. 1995), 20 *MPDLR* 52.

Title IV: Telecommunications

Title IV amends the Communications Act of 1934.[178] Accordingly, the act's enforcement mechanisms also apply to Title IV noncompliance. Although the Communication Act's enforcement scheme generally applies only to interstate carriers, the ADA specifically provides that the "same remedies, penalties, and procedures" that are applicable to interstate carriers extend to intrastate carriers responsible for telecommunications relay services under the ADA.[179]

Enforcement under the Communications Act, which mandates a universal communications service and sets minimum federal standards for that service, is necessarily different from the enforcement of other ADA titles, which prohibit discrimination. While enforcement under the act is mainly administrative,[180] under the other ADA titles a mixture of judicial and administrative enforcement mechanisms is available. Nevertheless, some similarities link Title IV's enforcement to the enforcement of other ADA titles. For example, the federal administrative process for certifying state relay services[181] is similar in concept to the U.S. Attorney General's certification of state building codes discussed under Title III, but the building code certification process requires a public hearing.

The Federal Communications Commission (FCC) is the agency responsible for investigating complaints of alleged violations of the Communications Act, including Title IV of the ADA.[182] The FCC must resolve a Title IV complaint within 180 days of filing. The FCC may order a carrier to comply immediately and to pay damages to the complaining party. Willful violations may result in criminal penalties, including fines of up to $10,000 and imprisonment. Moreover, although Title IV itself does not create a private right of action, the Communications Act, which encompasses it, generally permits individuals to file suits in court in lieu of filing complaints with the FCC to recover damages due to noncompliance.[183]

(c) Enforcement and Related Provisions Under Title V

Retaliation and Coercion

Title V[184] prohibits discrimination in the form of retaliation and coercion against individuals protected under the ADA and those trying to help them. All the remedies and enforcement mechanisms and procedures of Titles I, II, and III are available to those whose rights are aggrieved under this title.[185] The retaliation provision covers all forms of discrimination against an individual for opposing "any act or practice" that

178. 47 U.S.C. §201 *et seq.*
179. *Id.* at §225(b)(2).
180. *Id.* at §225(e).
181. *Id.* at §225(f).
182. *Id.* at §225.
183. *Id.* at §151 *et seq.*
184. 42 U.S.C. §12203.
185. *Id.* at §12203(c).

the ADA prohibits.[186] The provision barring coercion, interference, and intimidation is intended to protect individuals who are trying to exercise or enjoy rights protected by the ADA, or individuals who are trying to aid or encourage those individuals.[187]

Alternative Dispute Resolution/Mediation

The ADA clearly endorses the use of alternative means of resolving disputes—whenever appropriate and to the extent authorized by law—to enforce the ADA. Such alternatives include settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini trials, and arbitration.[188] Alternative dispute resolution mechanisms often provide speedier, less expensive, and less formal processes for enforcement than administrative resolution or litigation in court. Their use is intended to supplement—not supplant—other enforcement mechanisms available under the ADA. Thus, as noted later in the employment context, *see* 2.07, complainants may not be compelled to submit to dispute resolution mechanisms as a way to preclude them from using the courts.[189]

Relationship with Other Laws

Nothing in the ADA is meant to invalidate or limit any remedies, rights, or procedures available under other federal or state laws that provide greater or equal rights protection for individuals with disabilities.[190] This approach is consistent with other federal civil rights laws, which have similar provisions. Accordingly, an Alabama court ruled that in awarding plaintiffs state workers' compensation disability benefits, the court could not first consider whether the ADA limited the plaintiffs' right to recover under state law.[191] Also, a California federal court held that where the state's workers' compensation law did not cover disability discrimination, that law's exclusive remedy provision could not be used to limit a plaintiff's right to pursue relief under the ADA.[192]

1.05 Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act (FMLA) of 1993[193] requires public agencies, certain federal entities, and private-sector employers to provide 12 weeks of unpaid leave for family and medical reasons. Covered employers must maintain employees' preexisting group health insurance benefits while they are on FMLA leave. Unlike the

186. *Id.* at §12203(a).
187. *Id.* at §12203(b).
188. *Id.* at §12212.
189. Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998), 23 *MPDLR* 87.
190. 42 U.S.C. §12201(b).
191. Trans Mart, Inc. v. Brewer, 630 So. 2d 469 (Ala. Civ. App. 1993), 18 *MPDLR* 414.
192. Wood v. County of Alameda, 875 F. Supp. 659 (N.D. Cal. 1995), 19 *MPDLR* 338.
193. 29 U.S.C. §§2601-654.

ADA Title I, in enacting the FMLA, Congress successfully waived the states' sovereign immunity. *See* 1.07(c).

To be eligible for the FMLA's protection, an employee must be employed by private employers that have 50 or more employees and are engaged in interstate commerce, or by federal, state, or local governments. In addition, the employee must have worked for the employer for no fewer than 12 months, including 1,250 hours during the previous 12-month period.[194]

An eligible employee may take FMLA leave to care for a spouse, child, or parent who has a "serious health condition."[195] Upon returning from such leave, the employee must be restored to his or her original position or an equivalent position, with the same terms and benefits that existed before the leave.[196] Employees who believe they have been aggrieved under the FMLA may file an administrative complaint with the Department of Labor, or a private lawsuit.

An employee may take intermittent, as opposed to continuous, leave whenever it is medically necessary.[197] Either the employer or the employee may choose to use the employee's accrued leave at work to cover some or all of the FMLA leave.[198]

Under the FMLA, a serious health condition is an illness, injury, impairment, or physical or mental condition that results in such events as

(1) an overnight inpatient stay at a hospital, hospice, or residential medical care facility,
(2) absence from work or inability to perform other regular daily activities, or
(3) continuing treatment for a chronic or long-term condition that, if not treated, would incapacitate the family member for more than three days.[199]

(For a more detailed discussion of the FMLA, *see* 2.08(b)).

1.06 State Laws

While disability discrimination law has had a dominant federal focus, particularly in the developmental years, state laws have become increasingly more important as state legislatures have responded to more vocal disability constituencies and the federal options have been limited by enforcement difficulties, sovereign immunity concerns, and stricter court interpretations. Almost every jurisdiction now has a statutory scheme that prohibits discrimination on the basis of a person's disability.[200] Many of those statutes are modeled on the ADA generally, providing no more and sometimes less

194. *Id.* at §2611(2).
195. *Id.* at §2612(a)(1).
196. *Id.* at §2614(a)(1).
197. 29 C.F.R. §825.203(c). *See also* 5 C.F.R. §630.1204(b).
198. *Id.* at §825.207(a).
199. *Id.* at §825.800.
200. "Title I of the Americans with Disabilities Act and the States: A Statutory Comparison Eight Years Later," 2 *Syracuse J. of Legis. & Policy* #1, 1, 2 (1998).

protection. A number of states, however, have also expanded the federal protection to cover a larger group of persons. But there are also a number of states that have chosen to only enact the basic outline of the federal protections, while leaving the details of the statutory protections to be filled in by the courts.[201]

State statutes deal mostly with the same subjects as the ADA's Titles I, II, and III, although about a dozen jurisdictions now cover information technology and access for persons with disabilities similar to what the federal government does under §508 of the Rehabilitation Act. *See* 7.04.

Together, these state statutory provisions provide an important mosaic of possible legal remedies that should be considered when disability discrimination is being discussed. How useful these provisions may be depends on the particular statutory scheme in a given jurisdiction, the nature of the dispute, and the likely outcome in pursuing federal remedies. Nevertheless, as is demonstrated in the rest of this *Handbook*, whether the subject matter involves employment, public services, public accommodations, housing, education, or telecommunications, state law has an important—albeit oftentimes a limited—role to play, usually complementing the federal law.

Occasionally, though, state law will provide greater protections than the applicable federal provisions. A prominent example of such a statute is California's Fair Employment and Housing Act, which, unlike the ADA, does not require complainants to prove that their impairments are substantially limiting in order to demonstrate that they have a covered disability.[202] They need only demonstrate that they have an impairment that makes the achievement of a major life activity difficult. Similarly, a New Jersey appeals court ruled that an employee with attention deficit disorder had a covered condition, because the state's discrimination statute was not limited to severe disabilities.[203] Another example is a Minnesota law, in which that state waived its sovereign immunity to enable employees, former employees, or prospective employees aggrieved by the state's violation of the ADA or the FMLA to sue for legal or equitable relief, including money damages.[204] A third example is Massachusetts' anti-discrimination statute,[205] which—as interpreted by the state's highest court—mandates that in deciding whether a person has a covered "handicap," an assessment should be made without regard to corrective devices or other mitigating measures.[206]

201. *Id.* at 2.
202. Cal. Gov't Code §12926.1(c), 25 *MPDLR* 139.
203. Domurat v. Ciba Speciality Chems. Corp., 801 A.2d 423 (N.J. Ct. App. 2002), 26 *MPDLR* 838 (interpreting the New Jersey Law Against Discrimination, N.J. Stat. Ann. §10:5-1–42).
204. Minn. Stat. §1.05, 25 *MPDLR* 686. *But see* Faibisch v. University of Minn., 304 F.3d 797 (8th Cir. 2002), 26 *MPDLR* 1041.
205. Mass. Gen. Laws ch. 151B, §1 *et seq.*
206. Dahill v. Police Dep't of Boston, 748 N.E.2d 956 (Mass. 2001), 25 *MPDLR* 581.

1.07 Sovereign Immunity Limitations

(a) Generally

The Eleventh Amendment guarantees states immunity from suit to the extent that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens on another state, or by citizens or subjects of any foreign state." As interpreted by the U.S. Supreme Court, this states' rights principle limits judicial authority contained in Article III of the Constitution.[207] With regard to discrimination issues for persons with disabilities, in recent years particularly, sovereign immunity has had a chilling effect on federal lawsuits brought against state governments. However, this type of immunity is not an absolute bar against such suits, for there are many exceptions and areas where the law remains unclear or untested. Moreover, states may waive their immunity. Some already have done so, although often with specified limitations.

The first major sovereign immunity decision involving a federal disability discrimination statute was *Atascadero State Hospital v. Scanlon,*[208] in which the U.S. Supreme Court ruled that state immunity had not been waived under §504 of the Rehabilitation Act. Congress, reasoned the justices, can only incorporate such a waiver in legislation by "making its intention unmistakably clear."[209] In 1986, Congress endeavored to be unmistakably clear in a statutory amendment to the Rehabilitation Act, which specified that state programs—including colleges, universities, and post-secondary institutions of higher learning—are covered by §504 if they receive federal financial assistance.[210] The U.S. Supreme Court in 1996, however, concluded that with respect to claims against the federal government for monetary damages under §504, Congress had not made its intentions clear enough and, thus, had not waived federal sovereign immunity in a case filed by a Merchant Marine Academy cadet with diabetes who was denied his commission as an officer.[211]

(b) ADA Title I

Five years later, in *Board of Trustees of the University of Alabama v. Garrett,*[212] a divided Supreme Court struck down Title I as applied to states (and state agents) in private lawsuits filed in federal court seeking monetary damages. A narrow 5-4 majority found that Congress, in enacting Title I, had violated the Eleventh Amendment by failing to act pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment. The majority found that the ADA's proponents had failed to demonstrate

207. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984), 8 *MDLR* 7.
208. 473 U.S. 234 (1985), 9 *MDLR* 270.
209. *Id.* at 242.
210. 42 U.S.C. §2000d-7(a)(1); 29 U.S.C. §794(b).
211. Lane v. Pena, 518 U.S. 187 (1996), 20 *MPDLR* 550.
212. 531 U.S. 356 (2001), 25 *MPDLR* 236.

that the states had discriminated against persons with disabilities in violation of the prohibitions intended by the Fourteenth Amendment, and that the ADA was not a congruent and proportional response to the discrimination alleged.

As a result of *Garrett*, Title II of the ADA and other federal disability discrimination statutes—including the Fair Housing Amendments Act and §504—may be subject to similar immunity limitations.[213] However, even if U.S. Supreme Court were to apply the *Garrett* rationale to these other statutory provisions, that decision is limited to monetary damages, meaning that employees still may be able to sue for injunctive relief.[214] Also, *Garrett* does not include local governments,[215] and the U.S. Department of Justice may still sue for monetary damages to enforce Title I and other disability discrimination statutory provisions against the states.[216]

(c) FMLA

The Supreme Court's position on sovereign immunity with regard to disability discrimination was refined in a 2003 decision, *Nevada Department of Human Resources v. Hibbs*,[217] which concerned an Eleventh Amendment challenge to the FMLA. There, a majority of the justices found that the FMLA, as applied to the states, did not violate Eleventh Amendment sovereign immunity in providing both monetary and equitable remedies to private individuals. Chief Justice Rehnquist, joined by four other justices, reasoned that unlike disability-based discrimination, gender-based discrimination is entitled to heightened equal protection scrutiny. Thus, the FMLA, which addresses gender discrimination in a "narrowly targeted" way, is a congruent and proportional congressional response to violations of §5 of the Fourteenth Amendment.

The majority made it clear that federal statutes prohibiting disability discrimination are easily distinguishable from the FMLA in two ways. First, as already noted, disability discrimination is not subject to heightened scrutiny, but rather to the less demanding traditional "rational-basis test." Quoting from *Garrett*, Rehnquist observed, "'States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational.'"[218]

Second, unlike the FMLA, which has a very precise requirement that state employers provide unpaid leave, the ADA Title I was found to be unconstitutional because it "applied broadly to every aspect of state employers' operations."[219] Similarly, the ADA Title II has a very broad application, which includes the type of "specific accommodation" requirement that the Supreme Court eschews.

213. *See* Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001), 25 *MPDLR* 952.
214. Board of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001), 25 *MPDLR* 236.
215. *Id.* at 369.
216. *Id.* at 374.
217. 123 S. Ct. 1972 (2003), 27 *MPDLR* 449.
218. *Id.* at 1982.
219. *Id.* at 1983.

An encouraging aspect of the *Hibbs* decision, ironically, is contained in Justice Kennedy's dissent, which was joined by Justices Thomas and Scalia. In explaining why they believed the FMLA was unconstitutional in allowing private individuals to sue the states in federal court for monetary damages, the dissent acknowledged that the FMLA still would have allowed federal remedies. The "United States may enforce these [FMLA] standards in actions for money damages; and private individuals may bring actions against state officials for injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908)."[220]

(d) Other Issues Including ADA Title II; §504; State Laws

A number of other opinions also shed some light on the sovereign immunity issue. A divided U.S. Supreme Court, for example, found that federal supplemental jurisdiction—which would normally toll the statute of limitations for a state claim while a federal claim arising from the same circumstances proceeds in federal court—does not apply in an employment discrimination case, if the defendant is the state and the federal claim was dismissed on sovereign immunity grounds.[221] While this decision was made under the Age Discrimination in Employment Act,[222] it also covers ADA Title I cases. Thus, if a plaintiff's ADA Title I claim is dismissed as a violation of sovereign immunity, the plaintiff will receive no additional time to file the same claim under state law.

Several U.S. Courts of Appeals have decided Eleventh Amendment immunity cases under the ADA Title II. Not surprisingly, the prevailing view is that the principles established in *Garrett* apply to Title II as well.[223] Not all the ADA Title II decisions since *Garrett* have resulted in restrictive rulings, however. The Sixth Circuit, for instance, distinguished *Garrett*, finding that Eleventh Amendment sovereign immunity did not bar a $400,000 jury award for a plaintiff under Title II against the State of Ohio for failing to provide him with a hearing aid that would allow him to participate in a child custody proceeding.[224] While *Garrett* had applied an equal protection analysis to the ADA Title I, here the plaintiffs had relied on the Due Process Clause. Congress was well within its express constitutional authority to require states, like Ohio, to properly balance "the private interests at stake, the government's interests, and the risk that the procedures used will lead to erroneous decisions."[225]

In another post-*Garrett* decision, the Tenth Circuit concluded that the State of Kansas, by accepting federal funds, had waived its immunity under §504 of the Rehabilitation Act with respect to a lawsuit seeking injunctive relief.[226] This case was

220. *Id.* at 1994.
221. Raygor v. Regent of Univ. of Minn., 534 U.S. 533 (2002), 26 *MPDLR* 502.
222. 29 U.S.C. §621 *et seq.*
223. Garcia v. S.U.N.Y. Health Scis. Ct. of Brooklyn, 280 F.3d 98 (2d Cir. 2001), 25 *MPDLR* 952. Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001), 25 *MPDLR* 719.
224. Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002), 26 *MPDLR* 186.
225. *Id.* at 814.
226. Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002), 26 *MPDLR* 810. *See also* Koslow v. Pennsylvania, 302 F.3d 161 (3d Cir. 2002), 26 *MPDLR* 1038.

significant, because the claims were based on disparate impact rather than intentional discrimination.

In addition, sovereign immunity does not appear to limit suits under the IDEA. Even before *Garrett,* the Eighth Circuit, in finding that states had not waived their immunity under §504, concluded that the same plaintiffs could go forward with their IDEA claim because the State of Arkansas, by voluntarily participating in the federal education-spending program, had waived its immunity.[227]

Finally, even if lawsuits for monetary damages under ADA Title II and §504 are barred, lawyers handling disability discrimination lawsuits may be able to use state laws in order to obtain monetary relief against state defendants where states have waived their immunity. This is particularly true now, because the U.S. Supreme Court in a 2002 decision ruled that states waive their sovereign immunity when they voluntarily remove a state court claim to federal court.[228]

1.08 Attorneys' Fees

(a) Federal Attorneys' Fees Statutes

Five separate, but similar, federal provisions permit the award of reasonable attorneys' fees to prevailing plaintiffs in disability-related lawsuits. The Civil Rights Attorneys' Fees Awards Act[229] helps enforce the Civil Rights Act of 1964,[230] which provides citizens the opportunity to recover the costs of vindicating those civil rights.[231] Some of the largest awards under this statute have come in class action suits involving state institutions. [232]

Section 505 of the Rehabilitation Act[233] ensures that a prevailing party can recover reasonable attorneys' fees in Rehabilitation Act actions involving discrimination complaints in programs or activities receiving federal financial assistance.

The ADA[234] provides that prevailing parties may be entitled to attorneys' fees under three separate provisions: (a) Title I,[235] which addresses employment, as set forth in the Civil Rights Act of 1964;[236] (b) Title II,[237] which addresses state and local government services, as set forth in §505 of the Rehabilitation Act;[238] and (c) Title

227. Bradley v. Arkansas Dep't of Educ., 189 F.3d 745 (8th Cir. 1999), 23 *MPDLR* 667, *rev'd on other grounds sub nom.* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000), 25 *MPDLR* 207.
228. Lapides v. Board of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002), 26 *MPDLR* 687.
229. 42 U.S.C. §1988.
230. *Id.* at §2000d *et seq.*
231. *Id.* at §2000e *et seq.*
232. Wyatt v. Sawyer, 67 F. Supp. 2d 1331 (M.D. Ala. 1999), 24 *MPDLR* 31; Ihler v. Chisholm, 995 P.2d 439 (Mont. 2000), 24 *MPDLR* 368.
233. 29 U.S.C. §794a.
234. 42 U.S.C. §12101 *et seq.*
235. *Id.* at §12117(a).
236. *Id.* at §2000e-5(k).
237. *Id.* at §12133.
238. 29 U.S.C. §794(a).

III,[239] which addresses public accommodations, as set forth in the Civil Rights Act.[240] In addition, the ADA permits an award of reasonable attorneys' fees and costs to the prevailing party (other than the United States) in any judicial or administrative proceeding.[241] If attorneys' fees are available under another law, such as the Civil Rights Act, and are incorporated into the ADA by reference, such as in Titles I, II, and III, the ADA's provision is meant to be a complimentary provision that simply reaffirms the elements intended by Congress. Attorneys' fees and costs may be awarded at the discretion of the presiding court or agency. The United States is liable for attorneys' fees to the same extent as a private individual.

Congress amended the IDEA to provide a discretionary award of attorneys' fees. The amendment, known as the Handicapped Children's Protection Act (HCPA),[242] provides that plaintiffs may be entitled to fee awards when they prevail on their claims for a free appropriate public education. Unlike the other federal statutes mentioned, however, the HCPA provides that attorneys' fees cannot be awarded if the relief obtained is no more favorable than that which a previously rejected settlement offered.[243] Also, parents may not recover attorneys' fees for services that are recovered through mediation where the services obtained were either not required by law or not requested by the parents.[244] In addition, attorneys' fees are barred for legal services contributed by parents who are attorneys and are representing their own children in IDEA proceedings.[245]

Finally, the Equal Access to Justice Act (EAJA)[246] was established to correct the inequity that existed because private citizens were rarely able to collect payment for their costs in suits against the federal government. The EAJA allows prevailing parties to recover reasonable costs "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[247] Thus, under the EAJA, to be awarded attorneys' fees a party must not only prevail, but also show that the government's position in denying benefits was not substantially justified.[248] Moreover, prevailing attorneys may not ask courts to direct the federal government to apply the claimant's benefits to pay such fees to counsel directly.[249] The attorneys must collect the fees from the claimants.

(b) Prevailing Parties

The legislative histories of the ADA and Title VII of the Civil Rights Act suggest that most often attorneys' fees should be awarded when a private complainant is the

239. 42 U.S.C. §12188(a)(1).
240. *Id.* at §2000a-3(a), (b).
241. *Id.* at §12205.
242. 20 U.S.C. §1415(i)(3).
243. *Id.* at §1415(i)(3)(D).
244. Edie F. v. River Falls Sch. Dist., 243 F.3d 329 (7th Cir. 2001), 25 *MPDLR* 337.
245. Doe v. Board of Educ. of Baltimore County, 165 F.3d 260 (4th Cir. 1998), 23 *MPDLR* 23.
246. 28 U.S.C. §2412.
247. *Id.* at §2412(d)(1)(A).
248. Harris v. Railroad Retirement Bd., 990 F.2d 519 (10th Cir. 1993), 17 *MPDLR* 436; Marcus v. Shalala, 17 F.3d 1033 (7th Cir. 1994), 18 *MPDLR* 440.
249. Bowen v. Galbreath, 485 U.S. 74 (1988), 12 *MPDLR* 187.

prevailing party, because private lawsuits would be a major incentive for compliance with the statutes. Therefore, except in special circumstances, the expectation is that a prevailing complainant will be awarded attorneys' fees. On the other hand, as the U.S. Supreme Court explained in a case brought under Title VII of the Civil Rights Act, prevailing defendants should only be awarded attorneys' fees when the plaintiff's claim is frivolous or unreasonable; otherwise, the prospect of plaintiffs paying attorneys' fees would undercut legitimate attempts by plaintiffs to redress their grievances.[250]

Each of the aforementioned statutory attorneys' fees provisions is limited by the requirement that only "prevailing parties" may recover. Over the years, much litigation has ensued as to what constitutes a prevailing party. Recently, the U.S. Supreme Court addressed one major aspect of this question. In a 5-4 opinion, written by Chief Justice Rehnquist, a bare majority struck down the rationale used in a long line of cases that allowed fees to be awarded if plaintiffs proved to be the "catalysts" for change, even if they did not obtain a judgment or a court-ordered consent decree.[251] *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* held that in order to be a "prevailing party," plaintiffs must secure a judgment or consent decree in which the court orders a change in the relationship between plaintiffs and defendants. This change does not have to include an award of damages or an admission of liability, but it must be more than a mere settlement.

Initially, some commentators worried that the *Buckhannon* decision would be a major "setback to civil rights."[252] While the decision certainly has limited attorneys' fees except where plaintiffs prevail in court, certain exceptions remain unaffected. Two U.S. Courts of Appeals decisions illustrate the very different paths courts may take in future prevailing party litigation. In one case, the Second Circuit reversed an attorneys' fees award under the IDEA and §504, because the settlement that the plaintiff's obtained was not court sanctioned.[253] The appeals court noted that a defendant's voluntary change of conduct, by itself, is insufficient to justify attorneys' fees. The court emphasized that nothing in the attorneys' fees statutes governing the IDEA and §504 would require a different outcome for attorneys' fees under the ADA.[254]

The Ninth Circuit, on the other hand, took a very different tact in an IDEA case, concluding that the Supreme Court's language in *Buckhannon*—that plaintiffs are not prevailing parties unless they win a court judgment or the court approves a consent decree or settlement—should be viewed as dictum, and not precedent.[255] That appeals

250. Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978).
251. Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598 (2001), 25 *MPDLR* 532.
252. Paolo G. Annino, "The Buchannon Decision: The End of the Catalyst Theory and a Setback to Civil Rights," 26 *MPDLR* 11.
253. J.C. v. Regional Sch. Dist. 10, 278 F.3d 119 (2d Cir. 2002), 26 *MPDLR* 194. *But see* American Disability Ass'n, Inc. v. Chmielarz, 289 F.3d 1315 (11th Cir. 2002), 26 *MPDLR* 617 (upholding a settlement because the court had approved it and retained jurisdiction over the settlement's terms).
254. *J.C.*, 278 F.3d 119.
255. Barrios v. California Interscholastic Fed'n, 277 F.3d 1128 (9th Cir. 2002), 26 *MPDLR* 195.

court stated that it would follow its own precedent in a prior ADA decision,[256] which held that plaintiffs prevail when they enter into a legally enforceable settlement agreement that is contrary to the defendants' interests.

In another matter, the Eighth Circuit awarded attorneys' fees under the IDEA, finding that parents were prevailing parties as against the Iowa Department of Education—and not the local school district—because the state agency had zealously opposed the parents' position that their child was entitled to a full-time instructional assistant and the lower court had ruled for the parents.[257] The parents were not entitled to fees during the administrative proceedings, however, because the state defendants did not participate in that part of the case.

Also, in opinions that preceded *Buckhannon*, the U.S. Supreme Court ruled that lower courts could approve settlements in which clients waived attorneys' fees in exchange for broad injunctive relief,[258] but could not award fees for negotiated settlements of administrative complaints.[259] The Court also found that courts could not award fees for expert witnesses,[260] but this was reversed legislatively.[261]

Finally, states on occasion have tried to limit attorneys' fees legislatively, but may not do so in ways that preempt federal legislation. Virginia, for instance, enacted a provision that would have barred all attorneys' fees, including claims based on federal law, if the plaintiffs are represented by state-run advocacy agencies. While the Fourth Circuit agreed that the law could be applied where a state agency is pursuing state law claims, it struck down the statute as applied to attorneys' fees that arose from federal claims under the ADA and §504, because those federal statutes preempted state law.[262]

(c) Reasonable Attorneys' Fees

Another issue that has been the subject of much litigation over the years is how courts are to determine what constitutes reasonable attorneys' fees. To a certain extent, reasonableness relates to how much a plaintiff is viewed by the court as having prevailed in the litigation. The U.S. Supreme Court explored this issue in a number of cases decided under §1988 of the Civil Rights Act.[263] In *Hensley v. Eckerhart*,[264] the justices declared that attorneys' fees in such cases should be reduced whenever plaintiffs do not achieve their intended results completely. The most important factor in awarding fees, explained the Court, was the overall "results obtained." Thus, plaintiffs who achieved substantial success do not have to have their fees reduced merely because they did not prevail on every claim. Based on the *Hensley* rationale, the Sixth Circuit

256. Fischer v. SJB-P.D., Inc. 214 F.3d 1115 (9th Cir. 2000), 24 *MPDLR* 555.
257. John T. v. Iowa Dep't of Educ., 258 F.3d 860 (8th Cir. 2001), 25 *MPDLR* 732.
258. Evans v. Jeff D., 475 U.S. 717 (1986), 10 *MPDLR* 207.
259. North Carolina Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6 (1986), 10 *MPDLR* 572.
260. West Virginia Univ. Hosps. v. Casey, 499 U.S. 83 (1991), 15 *MPDLR* 296.
261. 42 U.S.C. §1988(c).
262. Brinn v. Tidewater Transp. Dist. Comm'n, 242 F.3d 227 (4th Cir. 2001), 25 *MPDLR* 336.
263. 42 U.S.C. §1988.
264. 461 U.S. 424 (1983), 7 *MPDLR* 307.

concluded that a party who prevailed on one of four claims was still entitled to attorneys' fees because, as a result of the litigation, his child obtained an appropriate education.[265]

Subsequently, the U.S. Supreme Court also held that "reasonable fees" must be calculated according to the prevailing market rates in the particular community in which the litigation occurred.[266] "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization."[267] Thus, nonprofit legal aid organizations should be awarded fees equal to those charged by private law firms if the work is the same. The justices limited any additional "upward adjustment" of attorneys' fee awards by requiring that such a change be based on evidence in the record demonstrating the particular complexity of the litigation, the novelty of the issues, the high quality of the representation, or the "great benefit" to the plaintiffs' class.[268]

265. Phelan v. Bell, 8 F.3d 369 (6th Cir. 1993), 18 *MPDLR* 207.
266. Blum v. Stenson, 465 U.S. 886 (1984), 8 *MPDLR* 317.
267. *Id.* at 894.
268. *Id.* at 887.

PART II
Employment

2.01 Key Statutes and How They Interrelate

Employment is crucial to achieving independence and a sense of self-worth. Not surprisingly, there are both federal and state laws addressing discrimination against persons with disabilities in employment, but these laws do not—either individually or collectively—afford complete protections. In part, this is due to issues of enforcement and sovereign immunity discussed in Part I, *see* 1.04 and 1.07. In addition, there are significant gaps in coverage amongst the various laws.

The Rehabilitation Act of 1973[1] was the first statute with broad prohibitions against employment discrimination, and eventually became the model for Title I of the Americans with Disabilities Act (ADA) and many state laws. Section 501 mandates that each federal agency establish and implement affirmative action programs "to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."[2] Section 503 requires that any employer awarded a federal contract over $10,000 "shall take affirmative action to employ and advance in employment qualified individuals with disabilities."[3] Both §501 and §503 bar discrimination on the basis of disability.

Section 504, among other things, covers employment in all federally funded activities. It mandates that "otherwise qualified" individuals with disabilities cannot "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency" or the Postal Service.[4] Unlike the ADA Title I, §504 originally had no limitation with regard to the number of employees an employer had to employ in order to be covered by the act.[5] However, when §504 was amended to provide that the standards applied under the ADA Title I shall be "used to determine" whether §504 has been violated,[6] this created a split in the federal circuits as to whether §504 incorporated by reference Title I's requirement that an employer have 15 or more employees.[7]

Title I of the ADA[8] affords seemingly broader prohibitions in most respects. It provides that no employer with 15 or more employees shall discriminate against a qualified individual with a disability in any aspect of employment, including the pre-employment, on-the-job, and termination stages, and all "terms, conditions, and

1. 29 U.S.C. §§791-94.
2. *Id.* at §791(b).
3. *Id.* at §793.
4. *Id.* at §794.
5. Schrader v. Fred A. Ray, P.C., 296 F.3d 968 (10th Cir. 2002), 26 *Mental & Physical Disability L. Rep.* (hereafter *MPDLR*) 848.
6. 29 U.S.C. §794(d).
7. *Schrader*, 296 F.3d 968 (citing Johnson v. New York Hosp., 897 F. Supp. 83, 86 (S.D.N.Y. 1995), 19 *MPDLR* 627, *aff'd*, 96 F.3d 33 (2d Cir. 1996), concluding that no such limitation was intended by the amendment). *But see* Hiler v. Brown, 177 F.3d 542 (6th Cir. 1999), 23 *MPDLR* 550.
8. 42 U.S.C. §§12111-117.