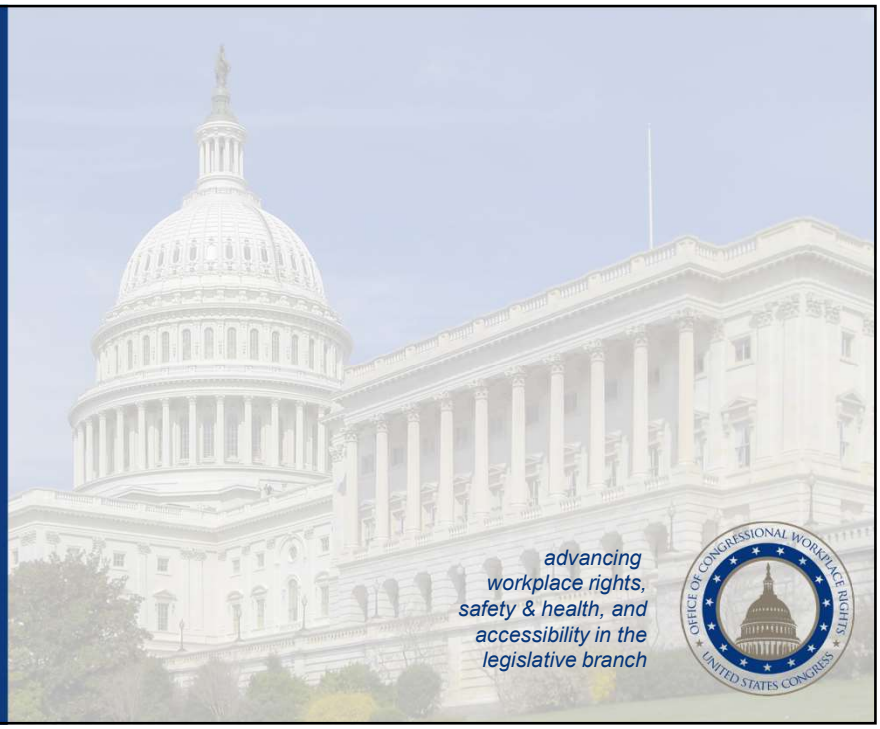
ADA Public Access Issues

Recent Developments

Office of Congressional Workplace Rights

Office of the General Counsel

February 22, 2023



Welcome

Overview

- ADA public access provisions
- Legislative branch process – inspections and investigations
- OCWR ADA regulations
- Recent case law on ADA public access issues
- Website accessibility

Presenters

- Dynah Haubert, Senior Attorney
- John Mickley, Associate General Counsel
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Introduction

Americans with Disabilities Act of 1990 (ADA)

- Unique among the laws applied by the CAA: affords protections to both employees and members of the public
- Titles II and III of the ADA, concerning public accessibility, apply to the legislative branch through section 210 of the CAA, 2 U.S.C. § 1331
- Title I of the ADA, concerning employment discrimination on the basis of disability, is applied to the legislative branch through section 201 of the CAA, 2 U.S.C. § 1311

ADA Titles II and III

- Title II
  - Applies to state and local governments
  - "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132
- Title III
  - Applies to places of public accommodation
  - Prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation…" 42 U.S.C. § 12182(a).

Legislative Branch Process

Biennial Inspections

- Focus is on identifying and assessing barriers to public access in publicly accessible areas
  - Special areas of focus each Congress
  - All Members' offices are inspected each Congress
- Barriers are ranked by severity
- OCWR works with employing offices to ensure barriers are removed
- Reports published by OCWR each Congress, available on ocwr.gov
- OCWR OSH Specialists may also flag public access issues during their safety and health inspections

Requests for Inspection/Charges of Discrimination

- Filed with OCWR General Counsel
- Form is available on the OCWR website
- Requests can be filed regardless of whether the Requestor has a disability; if the Requestor is a qualified individual with a disability, the request is treated as a charge of discrimination
- Requestor's identity can be kept confidential, upon request
- Must be filed within 180 days of encountering the barrier

Investigation of Requests/Charges

- After filing, OCWR will notify the employing office and begin investigation
- If General Counsel finds merit, GC may request mediation or file a complaint
- Complaints are submitted to a hearing officer for administrative hearing
- Hearing officer decisions can be appealed to OCWR Board and then to U.S. Court of Appeals for the Federal Circuit
- Most issues are resolved quickly after filing and can be resolved at any stage
- OCWR GC has sole prosecution authority – there is no private right of action to enforce public access provisions of the ADA under the CAA

OCWR ADA Regulations

Background

- The CAA directs the OCWR Board to issue its own ADA public access regulations
- The CAA requires the Board's regulations to be the same as the Department of Justice and Department of Transportation regulations, except to the extent that the Board may determine that a modification would be more effective in implementing ADA public access protections

History

- 1997 – Board adopted and published regulations after notice & comment period; no congressional action was taken
- 2016 – Board adopted and published revised regulations after notice & comment period; no congressional action was taken
- 2022 – Board adopted revised regulations after considering comments submitted by stakeholders

2022 Adopted Regulations – Modifications Since 2016

- Modifications to regulations incorporated by reference
  - Ones that reflect updates to executive agency regulations (ADAAA final rule; captioning and audio description final rule)
  - Others (further elimination of duplication between titles; modification of §35.107, relating to ADA coordinator; elimination of paratransit requirements)
- Other modifications to the regulations (removal of substantive regulations in favor of procedural rules to govern procedure re: OCWR statutory duties; changes reflecting passage in 2018 of the CAA Reform Act)

Currently Applicable Regulations

- Section 411 of the CAA provides that, while the CAA rulemaking procedure is underway, the corresponding executive agency regulations are to be applied
- For the ADA, these are the Department of Justice and Department of Transportation ADA public access regulations (28 C.F.R. Parts 35 and 36 and 49 C.F.R. Parts 37 and 38)

Recent Case Law

Definition of Disability

- The ADA at 42 U.S.C. § 12102(1) defines "disability" with respect to an individual as:
  (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
  (B) a record of such an impairment; or
  (C) being regarded as having such an impairment
- Applies to all three Titles under the ADA
- More details and examples are found in DOJ regulations at 28 C.F.R. §§ 35.108 and 36.105.

Definition of Disability – Recent Cases

- *Ramsay v. Nat'l Bd. of Med. Exam'rs*, 968 F.3d 251 (3d Cir. 2020) – Since the "substantially limits" inquiry "should not demand extensive analysis," a test-taker with ample evidence of low reading, processing, and writing skills was disabled for purposes of testing accommodations.
- *Hamilton v. Westchester Cnty.*, 3 F.4th 86 (2d Cir. 2021) – Under the ADA Amendments Act, a short-term injury, such as the plaintiff's knee injuries, can qualify as a disability.
- *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *reh'g denied*, 50 F.4th 429 (4th Cir. 2022) – In this § 1983 action by a formerly incarcerated individual, a Fourth Circuit majority held that gender dysphoria resulting from physical impairment is a disability under the ADA and Rehabilitation Act.

ADA Title II Claims

Plaintiff must establish that:

1. Plaintiff is a qualified individual with a disability;
2. Plaintiff was excluded from participation in, or denied the benefits of, a public entity's services, programs, or activities, or otherwise discriminated against by the public entity; and
3. The exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.

Title II – Service, Program, or Activity

"[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity..." 42 U.S.C. § 12132

- *Geness v. Admin. Off. of Penn. Cts.*, 974 F.3d 263 (3d Cir. 2020) – The "services, programs, or activities" at the foundation of the Plaintiff's Title II claim were not ones that the Defendants actually provided.

Title II – Meaningful Access

The ADA requires that individuals with disabilities be provided with meaningful access to programs, services, and activities of public entities – i.e., the opportunity to gain the same benefits as non-disabled individuals, not merely limited participation.

- *Brooklyn Ctr. for Indep. of the Disabled v. Metro. Transp. Auth.*, 11 F.4th 55 (2d Cir. 2021) – MTA's subway service may present barriers to meaningful access even if the system as a whole complies with the ADA.
- *Gustafson v. Bi-State Dev. Agency*, 29 F.4th 406 (8th Cir. 2022) – Bus driving past blind plaintiff three times within an eight-month period, when he rode the bus 50 to 100 other times per year, was not denial of meaningful access.
- *Guerra v. W. Los Angeles Coll.*, 812 F. App'x 612 (9th Cir. 2020) – Discontinuation of campus shuttle service resulted in denial of meaningful access to services for college students with disabilities.

Title II – Non-Preferred Accommodation

An entity is not necessarily required to provide the exact accommodation requested or preferred by an individual with a disability, as long as it provides a reasonable accommodation that allows meaningful access.

- *Fishman v. Off. of Ct. Admin., N.Y. State Cts.*, No. 20-1300, 2021 WL 4434698 (2d Cir. Sept. 28, 2021), *cert. denied*, 142 S. Ct. 1452 (2022) – In light of the alternative accommodations granted or offered by the Defendants, the Plaintiff did not plausibly allege that the denial of his preferred accommodation by itself constituted unlawful discrimination.

ADA Title III Claims

Plaintiff must establish that:

1. Plaintiff is an individual with a disability within the meaning of the ADA;
2. Defendant is a place of public accommodation; and
3. Defendant discriminated against plaintiff by denying plaintiff full and equal opportunity to enjoy the goods and services it provides.

Title III – Place of Public Accommodation

The ADA at 42 U.S.C. § 12181(7) and the DOJ regulations at 28 C.F.R. § 36.104 list categories of establishments that are considered places of public accommodation, including such types of entities as hotels, restaurants, theaters, stores, hospitals, professional offices, service establishments, terminals and stations, museums, parks, schools, recreational facilities, and others.

- *Langer v. Kiser*, 57 F.4th 1085 (9th Cir. 2023) – A parking lot was a "facility of a place of public accommodation" because the restaurant was a place of public accommodation and the parking lot was available for use by the restaurant's customers; evidence regarding the actual usage of the lot showed that restaurant customers were allowed to park there and routinely did so, despite the terms of the lease agreement that prohibited use of business' parking spaces by customers, and lack of accessible parking therefore violated Title III.

Title III – Full and Equal Enjoyment

Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation…" 42 U.S.C. § 12182(a).

- *A.L. by & through D.L. v. Walt Disney Parks & Resorts U.S., Inc.*, 50 F.4th 1097 (11th Cir. 2022) – The requested modification, which included unlimited access to theme park's rides without waiting, was not necessary for the full and equal enjoyment of Disney's services by a Plaintiff with autism who tended to have "meltdowns" when his routine was disrupted and had difficulty perceiving time.
- *Johnson v. Rehman*, 830 F. App'x 215 (9th Cir. 2020) – Where lack of accessible parking and non-compliant doorknob caused wheelchair user to encounter barriers to access not faced by non-disabled individuals, caused him difficulty, embarrassment, and frustration, and deterred him from patronizing a store, he was denied full and equal enjoyment of the store's services.

Title III – Readily Achievable

Places of public accommodation must remove architectural barriers in their existing facilities if to do so would be readily achievable.

- *Lopez v. Catalina Channel Express, Inc.*, 974 F.3d 1030 (9th Cir. 2020) – A Title III plaintiff bears the initial burden to show that barrier removal is "readily achievable" – i.e., to make a plausible showing that the cost of removing an architectural barrier does not exceed the benefits under the particular circumstances – and then the burden shifts to the defendant to show that removal is not readily achievable.

  Notably, this burden may be different in the context of historical buildings, because the defendant is in a better position to demonstrate whether the historic significance of a structure would be threatened or destroyed by the proposed barrier removal plan.

Title III – Facially Neutral Policies

A facially neutral policy violates the ADA only if it burdens a plaintiff with a disability in a manner different and greater than it burdens others.

- *Szwanek v. Jack in the Box, Inc.*, No. 20-16942, 2021 WL 5104372 (9th Cir. Nov. 3, 2021) – Restaurant's policy of closing indoor seating at night, and making food available only to customers in motor vehicles at the drive-thru window, was facially neutral because it did not distinguish between blind pedestrians (like the plaintiffs) and other non-disabled plaintiffs who do not have access to motor vehicles.

Title III – Futile Gestures

"Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." 42 U.S.C. § 12188(a)(1)

- *Equal Rights Ctr. v. Uber Techs., Inc.*, 525 F. Supp. 3d 62 (D.D.C. 2021) – A wheelchair user who learned of Uber's accessibility failures did not have to engage in the futile gesture of downloading the app and trying to get a ride in order to pursue an ADA claim.
- *Breeze v. Kabila Inc.*, 575 F. Supp. 3d 141 (D.D.C. 2021) – Although exterior barriers to access prevented the plaintiff from experiencing a restaurant's interior barriers first-hand, he had actual knowledge of those interior violations, and was not required to engage in the futile gesture of visiting the restaurant again in order to have standing to include the interior barriers in his claim.

Notable Fact Patterns – Service Animals

- *Mayle v. City of Chicago*, 803 F. App'x 31 (7th Cir. 2020) – Plaintiff did not have a Constitutional right to have an emotional support hog accompanying him in public; the ADA regulations have a rational basis for limiting service animals to dogs and miniature horses.
- *C.L. v. Del Amo Hosp., Inc.*, 992 F.3d 901 (9th Cir. 2021) – The ADA prohibits imposing certification requirements in order for a dog to qualify as a service animal under the statute; the ADA defines service animals functionally, without mention of specific training requirements, and allowing individuals with disabilities to self-train service animals furthers the stated goals of the ADA, because formal training could be prohibitively expensive.

Notable Fact Patterns – Effective Communication

- *Bax v. Drs. Med. Ctr. of Modesto, Inc.*, 52 F.4th 858 (9th Cir. 2022) – Evaluation of the effectiveness of communication methods with hearing-impaired individuals requires a fact-intensive, totality-of-the-circumstances review; in this case, the hospital's use of a video remote interpreter (VRI) system with occasional technical glitches did not violate the Rehabilitation Act, because isolated technical glitches did not constitute ineffective communication.

Notable Fact Patterns – Law Enforcement

- *King v. Hendricks Cnty. Comm'rs*, 954 F.3d 981 (7th Cir. 2020) – Circuit Courts are split on whether Title II applies to law enforcement investigations and arrests, and if so to what extent; in this case, the court assumed without deciding that Title II applied to police officers' deadly interaction with an individual who suffered from paranoid schizophrenia, but found that Title II was not violated because there was no evidence that the interaction would have been different if the individual had not suffered from mental illness.
- *Montgomery v. Dist. of Columbia*, No. CV 18-1928 (JDB), 2022 WL 1618741 (D.D.C. May 23, 2022) – D.C. police likely violated Title II by interrogating suspect who obviously had a mental illness without providing suspect any accommodation, even though suspect did not request accommodation.

Notable Fact Patterns – COVID-19

- *G.S. by & through Schwaigert v. Lee*, No. 21-5915, 2021 WL 5411218 (6th Cir. Nov. 19, 2021) – In a Title II case brought by parents of students with disabilities that made them especially vulnerable to COVID-19, the court upheld a preliminary injunction preventing students from opting out of masking requirements in Tennessee schools.
- *E.T. v. Paxton*, 41 F.4th 709 (5th Cir. 2022) – Texas students with disabilities lacked standing to seek injunction blocking executive order prohibiting school districts from imposing mask mandates; odds of injury were too speculative, other accommodations were available, and a "mobile mask mandate" following plaintiffs was not reasonable.
- *L.E. by & through Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296 (11th Cir. 2022) – District Court impermissibly redefined the scope of plaintiffs' request for temporary restraining order and preliminary injunction requiring Georgia school district to follow CDC guidelines for in-person learning; students were not claiming they were denied full and equal access to education generally, but specifically to *in-person* learning, so the availability of virtual learning was not a reasonable accommodation.

Website Accessibility

Website Accessibility – Regulations Are Coming Under Title II

- Currently there are no DOJ regulations governing website accessibility
- DOJ has announced it will issue regulations this year governing website accessibility under Title II (public entities)
  - NPRM estimated for May 2023, public comment by July 2023
  - https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1190-AA79
  - Meanwhile, the DOJ offers guidance on Web Accessibility and the ADA: https://www.ada.gov/resources/web-guidance/
- Employing offices covered by the CAA must comply with Title II requirements

Website Accessibility – Case Law Under Title III

- *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019) – Blind plaintiff prevailed on Title III claim based on incompatibility of Domino's mobile ordering system with his screen-reading software; Title III applied to the online ordering system because the web site and app "facilitate access" and "connect customers" to the physical restaurants.
- *Earll v. eBay, Inc.*, 599 F. App'x 695 (9th Cir. 2015) – eBay is not subject to the ADA because its services are not connected to any "actual, physical place."

Website Accessibility – Case Law Under Title III (cont'd)

- *Haynes v. Dunkin' Donuts LLC*, 741 F. App'x 752 (11th Cir. 2018) – Blind plaintiff stated a plausible claim under Title III based on incompatibility of Dunkin' Donuts' website with screen-reading software, because the website facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation.
- *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021), *opinion vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021) – Winn-Dixie's website is not a "place of public accommodation" despite its integration with physical stores, and the incompatibility of the website with screen-reading software thus did not violate Title III (Note: this opinion was vacated on procedural grounds.)

Questions?

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